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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 122.

PATRICK B. McCARTHY, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED SEPTEMBER 8, 1909.

(21,809.)

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1 The Supreme Court of the State of South Dakota.

No. 2361.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Return of Record and Proceedings in the Supreme Court of South Dakota, Certified to the Supreme Court of the United States upon a Writ of Error at the Instance of the Plaintiff and Appellant.

STATE OF SOUTH DAKOTA,
Office of Clerk Supreme Court, ss:

Pursuant to the command of the writ of error hereto attached, I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, do hereby return and transmit to the Supreme Court of the United States at Washington, and have hereunto annexed, a true copy of the record, and of the assignment of errors, and of all proceedings in the case of Patrick B. McCarthy, plaintiff and appellant, against First National Bank of Rapid City, South Dakota, a corporation, defendant and respondent, lately pending in the Supreme Court of said State, under my hand and the seal of said Court.

And I do hereby certify, that the said record and proceedings, as hereby certified and transmitted, consist of the following, to-wit: The original writ of error, and the original citation to the defendant in error, First National Bank of Rapid City, South Dakota, with proof of service of each thereof upon said defendant in error and its attorneys; the original petition for writ of error; the original assignment of errors; the original bond herein in the sum of one
2 thousand dollars for costs for the benefit of the defendant in error, duly approved by the Presiding Judge of the Supreme Court of South Dakota; the original order, allowing said writ of error, together with proof of filing of each thereof; also the original summons and complaint and proof of service thereof; answer; notice of motion to strike out the fifth and sixth paragraphs of the complaint as irrelevant and redundant; order of the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, within and for the county of Pennington, striking out all of the sixth paragraph of said complaint; verdict of jury; judgment of said Circuit Court; plaintiff's exceptions to charge of court; order of July 15, 1905, extending time for service of affidavits and statement of the case; stipulation of August 12, 1905, granting plaintiff thirty days' extension of time to serve proposed statement of the case, and order thereon accordingly; stipulation of August 29, 1905, giving defendant until October 15, 1905, to serve amendments to said proposed statement of the case; order of September 21, 1905, staying execution for forty

days from that date; affidavit for same, of September 21, 1905; proposed amendments to proposed statement of the case; notice of settlement of proposed statement of the case and proposed amendments, dated October 11, 1905; notice of August 14, 1905, appended to proposed statement of the case; statement of the case as settled and allowed by said Circuit Court, with certificate of judge of that court allowing same, of date October 16, 1905; order of October 17, 1905, allowing exceptions to settlement of said statement of the case; stipulation and order of October 31, 1905, giving plaintiff thirty days from that date to serve notice of motion for a new trial, and staying proceedings for that period; notice of motion for a new trial, of date November 23, 1905; order of November 29, 1905, extending plaintiff's time to perfect an appeal for thirty days; affidavit of Charles W. Brown of November 29, 1905; order of December 2, 1905,
3 denying motion for a new trial, with exception thereto; notice of appeal from judgment and order of said Circuit Court to the Supreme Court of South Dakota, of date December 21, 1905, and undertaking on said appeal, of same date; certificate of Clerk of said Circuit Court to original papers on said appeal, of date March 14, 1906; appellant's abstract on said appeal to Supreme Court of South Dakota, and appellant's brief on that appeal; respondent's brief on said appeal; copy of opinion of the Supreme Court of the State of South Dakota filed on said appeal on May 21, 1909, and copy of judgment of the Supreme Court of the State of South Dakota filed and entered on said appeal on May 21, 1909, together with the indorsements and filings upon the said several records and papers.

And I further certify and return that the foregoing are and constitute the whole and every part of the said record and proceedings in said case, together with the said assignment of errors and the said copies of the opinion and judgment of the Supreme Court of the State of South Dakota, as the same now remain on file and of record in my office, and that the record and proceedings aforesaid, with all things concerning the same, together with said writ are hereby transmitted and certified to the Supreme Court of the United States at Washington, D. C., pursuant to said writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of South Dakota, this 28th day of August, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States the One Hundred and Thirty Third.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,

Clerk of the Supreme Court of the State of South Dakota.

4 In the Supreme Court, State of South Dakota.

No. 2361.

PATRICK B. McCARTHY, Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, S. D., a Corporation, Respondent.

Be is remembered, that on the 10th day of July, 1909 that being a day of the regular April 1909 term of said court there was filed in the above entitled cause a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, which said Writ of Error is in words and figures, as follows, to-wit:

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Patrick B. McCarthy, appellant, and the First National Bank of Rapid City, South Dakota, a Corporation, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treatise or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellant as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court

6 may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 10th day of July, in the year of our Lord, One Thousand Nine Hundred and Nine.

[Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.]

OLIVER S. PENDER,
Clerk of the Circuit Court of the United States for the District of South Dakota.

Allowed by:

DICK HANEY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Seal Supreme Court, State of South Dakota.]

Attest:

FRANK CRANE, *Clerk.*
By MATTHEW W. MURPHY, *Deputy Clerk.*

7 UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Seth Bullock, United States Marshal for the District of South Dakota, do hereby certify and return that the annexed and within Writ of Error came into my hands for service on the 15th day of July, A. D. 1909, and that on the 16th day of July, A. D., 1909, I served the said Writ of Error upon the said The First National Bank of Rapid City, South Dakota, therein named as defendant in error, at the City of Rapid City, in the County of Pennington, in the District and State of South Dakota, by then and there delivering to and leaving with James Halley, then and there the President and one of the Directors of said The First National Bank of Rapid City, South Dakota, personally, a true copy of the said Writ of Error.

And I further certify that I served the said Writ of Error upon Charles J. Buell, a member of the law firm of Buell & Gardner, attorneys for said defendant in error, on the 16th day of July, A. D., 1909, at the City of Rapid City in the County of Pennington, in the District and State of South Dakota, by then and there delivering to and leaving with him personally a true copy of said Writ of Error.

Witness my hand at Deadwood, in the District of South Dakota, this 16th day of July, A. D., 1909.

SETH BULLOCK,
United States Marshal for the District of South Dakota.
By JOHN P. BELDING, *Deputy.*

[Endorsed:] Supreme Court, State of South Dakota. Filed Jul. 22, 1909. Frank Crane, Clerk.

8 Due personal service, by copy, of the within and annexed Writ of Error is hereby admitted and accepted, at my office in the City of Pierre, South Dakota, this 13th day of July, A. D., 1909.

Witness my hand and the seal of the Supreme Court of South Dakota, at Pierre, S. D., the day and year last above written.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of Supreme Court of South Dakota.

9 [Endorsed:] 2361. (Original.) Supreme Court of United States. Patrick B. McCarthy, Plaintiff in Error, vs. First National Bank of Rapid City, South Dakota, a Corporation, Defendant in Error. Writ of Error. Supreme Court, State of South Dakota, filed Jul- 10, 1909. Frank Crane, Clerk. Charles W. Brown, and Schrader & Lewis, Attorneys for Plaintiff in Error.

10 And afterwards, to-wit, on the same day a Citation was filed in the above entitled cause, which said Citation is in words and figures, as follows, to-wit:

11 UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Rapid City, South Dakota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of South Dakota, wherein Patrick B. McCarthy is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of July, in the year of our Lord, One Thousand Nine Hundred and Nine.

DICK HANEY,
Presiding Judge of the Supreme Court of the State of South Dakota.

12 UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Seth Bullock, United States Marshal for the District of South Dakota, do hereby certify and return that the annexed and within Citation came into my hands for service on the 15th day of July, A. D. 1909, and that on the 16th day of July, A. D. 1909, I served the said Citation upon the said The First National Bank of Rapid City, South Dakota, therein named as defendant in error, at the City of Rapid City, in the County of Pennington, in the District and State

of South Dakota, by then and there delivering to and leaving with James Halley, then and there the President and one of the Directors of said The First National Bank of Rapid City, South Dakota, personally, a true copy of the said Citation.

And I further certify that I served the said Citation upon Charles J. Buell, a member of the law firm of Buell & Gardner, attorneys for said defendant in error, on the 16th day of July, A. D. 1909, at the City of Rapid City in the County of Pennington, in the District and State of South Dakota, by then and there delivering to and leaving with him personally a true copy of said Citation.

Witness my hand at Deadwood, in the District of South Dakota, this 16th day of July, A. D. 1909.

SETH BULLOCK,
United States Marshal for the District of South Dakota.
By JOHN P. BELDING, *Deputy.*

13 [Endorsed:] 1361. (Original.) In Supreme Court of United States. Patrick B. McCarthy, Plaintiff in Error, vs. First National Bank of Rapid City, South Dakota, a Corporation, Defendant in Error. Citation. Charles W. Brown, and Schrader & Lewis, Attorneys for Plaintiff in Error. Supreme Court, State of South Dakota. Filed Jul- 10, 1909. Frank Crane, Clerk.

14 And heretofore, to-wit, on the twenty first day of June, A. D. 1909, a Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed in the above entitled cause, which said Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota is in words and figures, as follows, to-wit:

15 In the Supreme Court of the State of South Dakota, April Term, 1909.

PATRICK B. MCCARTHY, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota.

To the Hon. Dick Haney, Presiding Judge of the Supreme Court of the State of South Dakota:

Now comes the above named plaintiff and appellant by Charles W. Brown and Schrader & Lewis, his attorneys, and complains and alleges, that on the 21st day of May, 1909, the Supreme Court of the State of South Dakota, made and entered a final judgment herein in favor of the said respondent and against the said appellant, in

which final judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said plaintiff and appellant, all of which will more in detail appear from the assignment of errors which is filed with this petition. That the said Supreme Court of the State of South Dakota is the highest court of the said State of South Dakota in which a decision in this suit and this matter could be had. That the plaintiff is a citizen of the United States of America. That this action was brought by the said plaintiff and appellant as appears by his complaint and the record therein in the Circuit Court of the County of Pennington, in the State of South Dakota, to recover a penalty of double the sum of $3802.74, to-wit, the sum of $7605.48 under and according to the provisions of § 5198 of the Revised Statutes of the United States, the said sum of $3802.74 being the amount of usurious interest claimed to have been paid by the said plaintiff and appellant to the said defendant and respondent, a national banking association organized and existing under the laws of the United States of America. That the said action was tried by a jury in the said Circuit Court of said Pennington County, and there being no dispute as to the facts, and it appearing by the undisputed evidence in said case and being conceded therein that the said plaintiff and appellant had in fact paid the said sum of $3802.74 as and for usurious interest upon the indebtedness alleged in his complaint, and the sole question presented to said Circuit Court of said Pennington County being whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint was and is barred under and by virtue of the provisions of § 5198 of the Revised Statutes of the United States, and the said plaintiff and appellant contending in said Circuit Court and in said Supreme Court that said cause of action was not so barred, and the said defendant and respondent contending that the plaintiff's said cause of action was in fact barred by virtue of the provisions of said § 5198 of the Revised Statutes of the United States and having at the close of all the testimony in said case moved the said Circuit Court of said Pennington County for the direction of a verdict in favor of the said defendant and respondent and against the said plaintiff and appellant upon all the issues, upon the sole ground that the plaintiff's said cause of action alleged in his said complaint was and is barred under and by virtue of the provisions of the said § 5198 of the Revised Statutes of the United States, the said Circuit Court against the contentions of the said plaintiff and appellant ruled that his said cause of action alleged in his complaint was in fact barred by said § 5198 of the Revised Statutes of the United States, and sustained the said motion and ordered the said jury to enter a verdict in said action in favor of the said defendant and respondent and against the said plaintiff and appellant upon all the issues; and thereafter judgment was entered in the said Circuit Court of said Pennington County, finally dismissing the said action upon its merits, and awarding costs to the said defendant and respondent; and thereafter a statement of the said case having been duly settled and allowed in said Circuit Court of said Pennington County, containing all the evidence, rulings and proceedings in said Circuit

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Court, and the said plaintiff and appellant having moved the said Circuit Court to vacate and set aside the said verdict and
17 judgment and to grant a new trial of the said action, and the said motion having been by said Circuit Court overruled and denied, the said plaintiff and appellant duly perfected an appeal to the Supreme Court of the State of South Dakota from the whole and every part of said judgment and order, and upon the said appeal the said Supreme Court on the 21st day of May, 1909, entered its judgment affirming the said judgment of the said Circuit Court of said Pennington County, and holding and adjudging that the plaintiff's said cause of action set forth in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States, whereby manifest error has happened to the great damage of your petitioner. That although your petitioner in his complaint or declaration in the said Circuit Court of said Pennington County, as also in his assignment of error, and in his brief filed in said Supreme Court, specially set up and claimed a right to recover the said sum of $7605.48 as a penalty under and according to the provisions of said § 5198 of the Revised Statutes of the United States, yet the decision of the said Supreme Court of South Dakota as well as of said Circuit Court of said Pennington County, was against the said right so specially set up and claimed, and the said final judgment of the Supreme Court of South Dakota affirmed the said judgment of said Circuit Court finally dismissing said action upon the merits.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota and the Judges thereof, to the end that the record in said action and matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and the said judgment of the said Supreme Court of the State of South Dakota be reversed, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States; and your petitioner will ever pray.

Dated this 19th day of June, A. D. 1909.

PATRICK B. McCARTHY,
Petitioner.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Attorneys for said Petitioner.

18 The writ of error as prayed for in the foregoing petition is hereby allowed this 19th day of June, A. D. 1909, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of One Thousand Dollars ($1000.00).

Dated at Pierre, South Dakota, this 21st day of June, A. D. 1909.

DICK HANEY,
Presiding Judge of Supreme Court of the State of South Dakota.

19 [Endorsed:] 2361. (Original.) In the Supreme Court of S. Dak., April Term, 1909. Patrick B. McCarthy, Appellant, vs. First National Bank of Rapid City, South Dakota, a Corporation, Respondent. Petition for writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota. Charles W. Brown, and Schrader & Lewis, Attorneys for Appellant. Supreme Court, State of South Dakota. Filed Jun-21, 1909. Frank Crane, Clerk.

20 And afterwards, to-wit, on the same day an Assignment of Errors was filed in the above entitled cause, which said Assignment of Errors is in words and figures, as follows, to-wit:

21 In the Supreme Court of the State of South Dakota, April Term, 1909.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Assignment of Errors.

The appellant in this action, Patrick B. McCarthy, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial and in the decision of this cause, and says that in the record, proceedings, decision and final judgment of the Supreme Court of the State of South Dakota in the above entitled matter and cause, there is manifest error in this, to-wit:

First. The said Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Pennington County in the State of South Dakota, finally dismissing the plaintiff's said action upon the merits, and in holding and adjudging that the plaintiff's cause of action set forth in his complaint in said cause was and is barred under and by virtue of the provisions of § 5198 of the Revised Statutes of the United States, and the said judgment of said Supreme Court depends upon and is based on said decision.

Second. That the said Supreme Court of South Dakota in determining said cause and rendering and entering said judgment affirming the judgment of said Circuit Court of said Pennington County finally dismissing said action upon its merits, erred in this, to-wit: That although the said plaintiff in his complaint or declaration in said Circuit Court of said Pennington County, and upon the trial of said cause, as also in his assignment of error and in his brief filed in said Supreme Court, specially set up and claimed a right

22 to recover the sum of $7605.48, mentioned in his said complaint, as a penalty under and according to the provisions of said § 5198 of the Revised Statutes of the United States, yet the decision of the said Supreme Court of South Dakota, as well as of said

Circuit Court of said Pennington County, was against the said right so specially set up and claimed, and the said final judgment of said Supreme Court of South Dakota depends upon and is based on said decision.

Third. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Pennington County, erred in this, to-wit: That although in the pleadings in said cause and upon the trial thereof in said Circuit Court of said Pennington County, and in the Supreme Court of the State of South Dakota, it was contended by the said plaintiff, and specially set up and claimed by him in his brief and argument and in all the proceedings in said cause in said Supreme Court, that under section 5198 of the Revised Statutes of the United States the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore the cause of action does not accrue, until the lender has actually collected or received more than the original debt, yet the said Supreme Court of the State of South Dakota decided against the said contention of the said plaintiff, and said judgment depends upon and is based on said decison.

Fourth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said Circuit Court of said Pennington County erred in this, to-wit: That this action, as appears by the plaintiff's said complaint and by the record of said cause was commenced on the 25th day of January, 1905, in the Circuit Court of Pennington County in the State of South Dakota to recover a penalty of double the sum of $3802.74, to-wit, the sum of $7605.48 under and according to the provisions of § 5198 of the Revised Statutes of the United States, the said sum of $3802.74 being
23 the amount of usurious interest claimed to have been paid by the said plaintiff and appellant to the said defendant and respondent, a national banking association organized and existing under the laws of the United States of America; that the said action was tried by a jury in the said Circuit Court of said Pennington County, and there being no dispute as to the facts, and it appearing by the undispated evidence in said cause, and being conceded by the parties thereto, and found by said Supreme Court, as well as said trial court, that the original loan made by said defendant to the plaintiff and mentioned in said complaint was for $4000 and no more; that final judgment for the principal of said loan was entered in the Circuit Court of said Pennington County on the 12th day of January, 1905, and that the total payments made thereon from the origin of said indebtedness up to the 12th day of January, 1905, the date of the entry of said judgment for the principal of said loan, aggregated $3802.74, and no more, and that the said payments aggregating the said sum of $3802.74 were made as and for usurious interest upon the indebtedness alleged in said complaint; and the sole question presented to said Circuit Court of said Pennington County, being whether or not the plaintiff's said cause of action to recover the penalty alleged in his complaint was and is barred under

and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States, and the said plaintiff and appellant contending in said Circuit Court and in said Supreme Court that said cause of action was not so barred, and the said defendant and respondent contending that the plaintiff's said cause of action was in fact barred by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; and the said defendant having at the close of all the testimony in said case moved the said Circuit Court of said Pennington County for the direction of a verdict in favor of said defendant and respondent and against the said plaintiff and appellant upon all the issues, upon the sole ground that the plaintiff's said cause of action alleged in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; the said Circuit Court
24 against the contentions of said plaintiff and appellant, ruled that his said cause of action alleged in his complaint was in fact barred by said § 5198 of the Revised Statutes of the United States, and sustained the said motion and ordered the said jury to enter a verdict in said action in favor of said defendant and respondent and against the said plaintiff and appellant upon all the issues; and thereafter judgment was entered in the said Circuit Court of said Pennington County finally dismissing the said action upon its merits and awarding costs to the said defendant and respondent; and thereafter a statement of the said case having been duly settled and allowed in the said Circuit Court of said Pennington County, containing all the evidence, rulings, orders and proceedings in said Circuit Court, and said plaintiff having duly moved the said Circuit Court to vacate and set aside the said verdict and judgment and to grant a new trial of the said action, and the said motion having been by said Circuit Court overruled and denied, the said plaintiff and appellant duly perfected an appeal to the Supreme Court of the State of South Dakota from the whole and every part of said judgment and order of said Circuit Court, and upon the said appeal the said Supreme Court on the 21st day of May, 1909, entered its judgment affirming the said judgment of said Circuit Court, and holding and adjudging that the plaintiff's said cause of action set forth in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; and the said judgment of said Supreme Court depends upon and is based on the said decision, no other question having been presented to said Supreme Court for determination on said appeal.

Fifth. The said judgment of the Supreme Court of the State of South Dakota, as well as the said judgment of the Circuit Court of said Pennington County, is against law, and contrary to § 5198 of the Revised Statutes of the United States, in the following particulars:

1. It appears by the undisputed evidence in said cause that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of said action, and
25 that the same is not barred by § 5198 of the Revised Statutes of the United States; and there is no evidence that the plaintiff's said cause of action did not accrue within two years before

the commencement of said action or that the same is barred by said § 5198 of the Revised Statutes of the United States.

2. There is no evidence to support the direction of the said Circuit Court to the jury to return a verdict in said case in favor of the defendant and against the said plaintiff upon all the issues, or to support the said judgment of said Supreme Court of South Dakota affirming the said ruling, and the said direction of a verdict and said decision of said Supreme Court of South Dakota are contrary to the evidence and against law and contrary to the provisions of said § 5198 of the Revised Statutes of the United States.

3. It appears by the undisputed evidence that all the facts alleged in the plaintiff's said complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in the said Circuit Court of said Pennington County in favor of the said defendant and against the said plaintiff on the 12th day of January, 1905, and not before; that the total payments at any time made by said plaintiff upon the notes and indebtedness alleged in the fifth paragraph of said complaint did not exceed the sum of $4000, the amount of the original loan made by said defendant to said plaintiff in August, 1887; that the said plaintiff's cause of action to recover the penalty under the provisions of said § 5198 of the Revised Statutes of the United States did not accrue until the 12th day of January, 1905, and was therefore not barred by the provisions of said § 5198, this action having been duly commenced on the 25th day of January, 1905. And it clearly appears from the evidence that the said plaintiff is entitled to judgment against the said defendant for the amount claimed in his said complaint; that said plaintiff paid to said defendant and said defendant knowingly accepted and received from said plaintiff the usurious interest as in said complaint alleged, and that every allegation and issue made by the complaint and denied by the an-
26 swer is fully established by the evidence as in said complaint alleged, and the judgment of said Supreme Court as well as the judgment of said Circuit Court should have been in favor of said plaintiff and against said defendant upon all the issues; and for all the reasons aforesaid the said Circuit Court of said Pennington County erred in withdrawing said case from the jury and in ordering and directing a verdict in favor of said defendant and against said plaintiff upon all the issues, and the said judgment of said Supreme Court of South Dakota, affirming the said decision, is contrary to said § 5198 of the Revised Statutes of the United States, and the said judgment depends upon and is based on said decision.

Sixth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said Circuit Court, erred in this, to-wit: The said Circuit Court of said Pennington County erred in making and entering its order of date February 17, 1905, striking out the sixth paragraph of the complaint as irrelevant and redundant, and the said Supreme Court of the State of South Dakota erred in affirming and approving said decision and ruling, for the reasons that the allegations of said sixth paragraph of said complaint are

material to this controversy, and are properly a part of the issues in this action, and that said plaintiff was entitled to allege and prove as a part of his case the payment and satisfaction of the judgment in said sixth paragraph referred to as well as the date and amount thereof, and said allegations are competent, relevant and material to the issues in this action; that the allegations of said sixth paragraph are necessary for the full and complete presentation and maintenance of said plaintiff's case and the evidence in support thereof; that this action is brought to recover a statutory penalty under § 5197 and § 5198 of the Revised Statutes of the United States; that the final judgment in the action mentioned and referred to in the fifth paragraph of said complaint was filed and entered on the 12th day of January, 1905 and not before; that the total payments of both principal and interest on the original loan
27 mentioned in said fifth paragraph of the complaint did not equal the sum of $4000.00, the amount of said original loan; that it is and was necessary for the plaintiff to show the entry of final judgment upon the said indebtedness and the payment and satisfaction thereof as a condition precedent to the commencement and maintenance of this action; that said § 5198 of the Revised Statutes of the United States prescribes the penalty sued for in this action and controls all questions in regard to the recovery thereof; that the ruling of the said Circuit Court in striking out said sixth paragraph of said complaint, as well as the judgment of the said Supreme Court of South Dakota affirming the said ruling is contrary to the statutes of the United States and particularly to said § 5198; that for the reasons aforesaid the plaintiff was entitled to allege and prove as a part of his main case the full payment and satisfaction of the said judgment; that the said plaintiff was not entitled to maintain said action without alleging and showing the payment of a sum equal at least to the principal of the loan originally made to him by said defendant, and that plaintiff's cause of action for the recovery of a penalty under said § 5198 would not be complete and could not accrue without an allegation and proof that the plaintiff had before this action paid to the defendant an amount exceeding said original loan.

Seventh. The said Circuit Court of said Pennington County erred in sustaining the objections of the said defendant to the following question propounded to the witness Jacob S. Gantz, upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving the said ruling, to-wit:

"Q. You may state to the court and jury the record you have there with reference to this judgment, found on page 185 of judgment book of Circuit Court, Pennington County, South Dakota, book 4?"

And in sustaining the motion of said defendant to strike out the following answer thereto, to-wit:

"A. Patrick B. McCarthy, et al. judgment debtor, First National Bank of Rapid City, South Dakota, judgment creditor; amount of judgment, damages and costs, $5951.56; date of judgment,
28 January 12, 1905; when filed, January 12, 1905 at nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; judgment book No. 11, page 350, name of court, Circuit; Attorneys

of judgment creditors, Fred H. Whitfield; Satisfaction of judgment record No. 2, page 11; fully satisfied January 21, 1905, by payment of $5961.91. J. S. Gantz, Clerk of Courts."

For all the reasons hereinabove specified, and for the further reasons that whether or not it was necessary for the plaintiff to allege in his complaint the payment and satisfaction of said judgment, it was necessary and proper for him to prove said payment and satisfaction; that, as appears by the undisputed evidence herein, the amount of the loan originally made by the defendant to the plaintiff was $4000.00 and no more; that the total payments of both principal and interest made by said plaintiff to said defendant before the date of said judgment was less than the amount of said original loan; and that no cause of action to recover a penalty under §5198 of the Revised Statutes of the United States would be complete or could accrue without proof that the said plaintiff had before the commencement thereof paid to the defendant an amount exceeding the amount of said original loan. That said objections made by the defendant to said question are as follows:

"The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court, and objects to the payment or satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out. The defendant objects for the reasons that the entry is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings."

Which question, answer, objections, motion, ruling and exceptions appear on pages 28 and 29 of appellant's printed abstract in said Supreme Court of the State of South Dakota.

29 Eighth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the objections of said defendant to the following question propounded to the witness Gantz upon his direct examination, and the Supreme Court of South Dakota erred in affirming and approving said ruling, to-wit:

"Q. As Clerk of Courts I will ask you if on the 21st day of January, 1905, you were not paid as Clerk of this Court $5961.91 in satisfaction of this judgment, in full of the judgment, interest and costs to that date?"

Said objections being as follows:

"The defendant objects as calling for a conclusion of the witness, impertinent, and for all the reasons offered to the same evidence,—counsel knowing from the ruling of the court that it is inadmissable."

Which question, objections, ruling and exceptions appear on pages 29 and 30 of appellant's abstract filed in the Supreme Court of South Dakota.

Ninth. For all the reason- hereinbefore specified and assigned

the said Circuit Court of said Pennington County erred in sustaining objections of said defendant to the following question propounded to the witness Gantz upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, to-wit:

"Q. Mr. Gantz, I notice that in judgment book 4 of Pennington County on page 185, and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head 'satisfaction, remarks, etc.', page 185, you have just entered 'fully satisfied January 21, 1905 by payment of $5961.91, J. S. Gantz, Clerk of Courts'; I will ask you whether or not you paid that money to the plaintiff?"

To which question the defendant objected as cumulative and calling for a conclusion of the witness, and as assuming a fact not
30 in evidence, and as incompetent, irrelevant and immaterial for all the reasons stated in the former objection to the offer of proof relative to the payment of this or any other judgment.

Which question, objections, ruling and exception appear on page 31 of appellant's said abstract.

Tenth. For all the reasons hereinbefore specified and assigned the Circuit Court of said Pennington County erred in sustaining the objections of said defendant to plaintiff's offer in evidence of that part of page 185 of judgment book No. 4 of said Circuit Court relating to the said judgment of the First National Bank of Rapid City, South Dakota vs. Patrick B. McCarthy, et al, as it there appears of record, and the Supreme Court of South Dakota erred in affirming and approving said ruling,—said objections to said record and judgment docket being made upon the ground that the same is cumulative and for all of the reasons above noted to that class of testimony; and which offer, objections, ruling and exception appear on pages 31 and 32 of appellant's said abstract.

Eleventh. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the motion of said defendant to strike out that portion of the demand, Ex. 47 *a*., which refers to the payment of said judgment obtained by said defendant against said plaintiff, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling; for which motion no ground or reason was assigned and which motion, ruling and exception appear on page 59 of appellant's said abstract.

Twelfth. For all the reasons hereinbefore specified and assigned the said Circuit Court of Pennington County erred in sustaining the objections of said defendant to the said plaintiff's offer in evidence of Ex. 48, being a certified check for $5961.91, made and delivered by the plaintiff to Jacob S. Gantz, Clerk of Courts, January 21, 1905, in full payment and satisfaction of said judgment, and the
31 Supreme Court of the State of South Dakota erred in affirming and approving said ruling;—the said defendant objecting to said offer as a self-serving declaration, and incompetent, immaterial and irrelevant to prove or disprove any of the issues in this

case, it being a check, endeavoring to prove a payment which is not pleaded. Which offer, objections, ruling and exceptions appear on page sixty of appellant's said abstract.

Thirteenth. For all the reasons hereinbefore specified and assigned, the said Circuit Court of said Pennington County erred in refusing to give to the jury instruction No. 1 requested by said plaintiff and appellant, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, which instruction, refusal and exception, appear on pages 61 and 62 of said abstract, and are in words and figures as follows, to-wit:

"In Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, within and for the County of Pennington.

PATRICK B. MCCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 1 Requested by Plaintiff.

"The court instructs the jury that this action is based upon Section 5198 of the Revised Statutes of the United States, relating to national banks, and that the Statute of Limitations governing this action is the one provided for by said Section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you that the final judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said Section 5198 of the Revised Statutes of the United States, did not accrue and therefore, the Statute of Limitations therein provided did not
32 commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by said Statute of Limitations, and your verdict so far as the said limitation of two years is concerned will be in favor of the plaintiff and against the defendant.

Refused.

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*"

Fourteen. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in refusing to give to the jury instruction No. 2 requested by the plaintiff, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling,—which instruction, refusal and excep-

tion appear on pages 62 and 63 of said abstract, and are in words and figures as follows, to-wit:

"In Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 2 Requested by Plaintiff.

"You are further instructed that the evidence is undisputed that the loan between the plaintiff and bank referred to in the complaint was usurious and that the interest payments made upon the notes signed by P. B. McCarthy and Maggie McCarthy, dated July 22, 1891, and February 17, 1896 and marked Exhibits 43, 45
33 and 46 were *were* made by the plaintiff himself, and upon his own behalf, and as to all such payments of usurious interest your verdict will be for the plaintiff if you further find that the defendant through its managing officers knowingly accepted, received and retained the same.

Refused.

LEVI McGEE, *Judge.*

"To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*"

Fifteenth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the motion of said defendant and respondent to direct the jury to return a verdict in favor of said defendant and against said plaintiff upon all the issues, and in instructing and directing the jury to return such verdict and in withdrawing said case from the jury and ordering a verdict for the defendant herein, and the Supreme Court of the State of South Dakota erred in affirming and approving said charge and ruling, and said charge and ruling is contrary to the evidence and contrary to law and especially is contrary to said § 5198 of the Revised Statutes of the United States, and is not sustained by the evidence or by the law for all the reasons hereinbefore specified;—which motion, direction, instruction and exception appear on pages 64 65 and 66 of appellant's said abstract.

Sixteenth. For all the reasons hereinbefore specified and assigned the said verdict of said jury and the said judgment of said Circuit Court and the said judgment of the Supreme Court of the State of South Dakota are erroneous and contrary to law and contrary to said § 5198 of the Revised Statutes of the United States, and contrary to the evidence and are not sustained by the evidence and

should be vacated and set aside, and the said Supreme Court of the State of South Dakota should have reversed the said judgment of said Circuit Court and the said order overruling and denying
34 the said plaintiff's said motion for a new trial.

Wherefore, the said plaintiff and appellant prays that the said judgment and decision of the Supreme Court of the State of South Dakota may be reversed, annulled and altogether held for naught, and that the said plaintiff and appellant may be restored to all things which he has lost by the action and because of the said judgment and decision.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Attorneys for said Plaintiff in Error.

35 [Endorsed:] 2361. (Original.) In the Supreme Court of S. Dak., April Term, 1909. Patrick B. McCarthy, Appellant, vs. First National Bank of Rapid City, South Dakota, a Corporation, Respondent. Assignment of Errors. Supreme Court, State of South Dakota. Filed Jun- 21 1909. Frank Crane, Clerk. Charles W. Brown, and Schrader & Lewis, Attorneys for Appellant.

36 And afterwards, to-wit, on the same day a Bond on Writ of Error from Supreme Court of the United States to Supreme Court of State of South Dakota was filed in the above entitled cause, which said Bond on Writ of Error from Supreme Court of the United States to the Supreme Court of State of South Dakota is in words and figures, as follows, to-wit:—

37 In the Supreme Court of the United States.

PATRICK B. MCCARTHY, Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant in Error.

Bond on Writ of Error from Supreme Court of the United States to Supreme Court of State of South Dakota.

Know all men by these presents, That we, Patrick B. McCarthy, as principal, and Francis F. Joy, John Clower, and Western Surety Company, a Corporation duly organized and existing under the laws of the State of South Dakota, and having duly complied with the laws of said state relating to surety companies, as sureties, are held and firmly bound unto the First National Bank of Rapid City, South Dakota, a Corporation, in the sum of One Thousand Dollars ($1000), to be paid to the said obligee, its successors, representatives, and assigns; for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of June, A. D. 1909.

Whereas, The above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Dakota;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

PATRICK B. McCARTHY.
FRANCIS F. JOY.
JOHN CLOWER.
38 WESTERN SURETY CO.,
By HOWARD WORTH, *Agt.*

[Corporate Seal Western Surety Company, South Dakota.]

CHAUNCEY L. WOOD,
Its Attorney-in-Fact.

Signed, sealed and delivered in the presence of:
ROBERT BURTON,
CHARLES W. BROWN.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Be it remembered that on this 18th day of June, A. D., 1909, before me, Robert Burton, a Notary Public within and for said County and State, personally appeared Patrick B. McCarthy, Francis F. Joy and John Clower, known to me to be the persons who are described in and who executed the foregoing bond, and severally duly acknowledged to me that they executed the same as their free and voluntary act and deed.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Rapid City in said County and State the day and year last above written.

[SEAL.] ROBERT BURTON,
Notary Public in and for said County and State.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Be it remembered that on this 18th day of June, A. D., 1909, before me, Robert Burton, a Notary Public within and for said County and State, personally appeared Howard Worth and Chauncey L. Wood, known to me to be respectively the agent and attorney in fact of the corporation, Western Surety Company that is described in and that executed the within instrument, and severally duly acknowledged to me that such corporation executed the same.

39 And the said Howard Worth being duly sworn, deposes and says: That he is the agent and said Chauncey L. Wood is attorney in fact of and for said Western Surety Company; that the

seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and that the said instrument is the free act and deed of said corporation.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Rapid City, in said County and State, the day and year last above written.

[SEAL.] ROBERT BURTON,
Notary Public in and for said County and State.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Francis F. Joy, and John Clower, being severally duly sworn, each for himself and not one for the other, upon his oath says: The said Francis F. Joy, for himself says: That he is a resident and free holder within the State of South Dakota, and that he is worth the sum of Two Thousand Dollars ($2000.00), over and above all his debts and liabilities, in property within said State of South Dakota not by law exempt from execution. And the said John Clower, for himself says: That he is a resident and free holder within said state and that he is worth the sum of Two Thousand Dollars ($2000.00), over and above all his debts and liabilities, in property within this state not by law exempt from execution. And the said affiants further say, that they are the sureties named in and who executed the foregoing bond and that they reside at Rapid City in said County and State.

FRANCIS F. JOY.
JOHN CLOWER.

40 Subscribed and sworn to before me this 18th day of June, A. D., 1909.

[SEAL.] ROBERT BURTON,
Notary Public in and for said County and State.

I hereby approve the foregoing bond and sureties this 21st day of June, A. D., 1909.

DICK HANEY,
Presiding Judge of Supreme Court of the State of South Dakota.

41 [Endorsed:] 2361. (Original.) In the Supreme Court of the State of South Dakota. Patrick B. McCarthy, Plaintiff in Error, vs. First National Bank of Rapid City, South Dakota, a Corporation, Defendant in Error. Bond on Writ of Error from Supreme Court of the United States to Supreme Court of State of South Dakota. Supreme Court, State of South Dakota. Filed Jun-21, 1909. Frank Crane, Clerk. Charles W. Brown, and Schrader & Lewis, Attorneys for Plaintiff.

42 And afterwards, to-wit, on the same day an Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota was filed in the above entitled cause, which said Order is in words and figures, as follows, to-wit:—

43 & 44 In the Supreme Court of the State of South Dakota, April Term, 1909.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota.

The above entitled matter and cause coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, and upon examination and filing of said petition and the record in said matter, together with the said petitioner's assignment of errors, and desiring to give the said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered, That a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

Done at Pierre, in the State of South Dakota, this 21st day of June, A. D., 1909.

DICK HANEY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Seal Supreme Court, State of South Dakota.]

Attest:
FRANK CRANE, *Clerk*,
By MATTHEW W. MURPHY,
[SEAL.] *Deputy Clerk.*

45–436 [Endorsed:] 2361. (Original.) In Supreme Court of South Dakota. April Term, 1909. Patrick B. McCarthy, Appellant, vs. First National Bank of Rapid City, South Dakota, a Corporation, Respondent. Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota. Supreme Court, State of South Dakota. Filed Jun- 21, 1909. Frank Crane, Clerk. Charles W. Brown and Schrader & Lewis, Attorneys for Appellant.

437 And afterwards, to-wit, on the fourteenth day of May, A. D., 1906, Abstract of appellant was filed in the above entitled cause, which said Abstract is in words and figures, as follows, to-wit:

438 STATE OF SOUTH DAKOTA:

In the Supreme Court, April Term, A. D. 1906.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Appeal from Circuit Court of Pennington County.

ABSTRACT.

Charles W. Brown and Schrader & Lewis, Attorneys for Appellant.

Supreme Court, State of South Dakota.

Filed May 14, 1906.

FRANK CRANE, *Clerk.*

439 In the Supreme Court of the State of South Dakota, April Term, 1906.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Appeal from Circuit Court of Pennington County.

ABSTRACT.

Complaint.

The plaintiff in his complaint states his cause of action as follows: The Plaintiff Complains and Alleges:

I.

That the defendant is now and was at all the times hereinafter mentioned a national banking association duly organized and existing under the laws of the United States, and particularly,
440 Title LXII of the Revised Statutes of the United States of 1878, relating to national banks, and the Acts Amendatory thereof, as a corporation; and is now, and during all the times and transactions hereinafter mentioned was, located and doing business

in the City of Rapid City, in the County of Pennington, and State of South Dakota.

II.

That on August 22, 1887, at Rapid City, Dakota Territory, now State of South Dakota, the plaintiff made and delivered to the defendant his four certain promissory notes in writing, each for one thousand dollars, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, one thousand dollars, three months after said date, one thousand dollars six months after said date, one thousand dollars nine months after said date, and one thousand dollars twelve months after said date, with interest on each of said sums at eighteen per cent per annum from said date until fully paid, the said notes having been so made and given for the sum of four thousand dollars then loaned by the defendant to the plaintiff. That in and by the said notes, and at the time of the making of the loan it was knowingly, corruptly, and usuriously agreed by and between the plaintiff and the defendant that the plaintiff should pay and the defendant should take, receive, reserve, and charge on the said loan and notes a rate of interest greater than was then allowed by the laws of Dakota Territory, to-wit: interest at the rate of eighteen per cent per annum. That on the 24th day of January, 1888, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said four notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised
441 to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said last named date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named note being also signed and executed by one M. McGuire and D. J. Tighe. That on April 23, 1888, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said last named date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named note being also signed and executed by said McGuire and Tighe. That on August 7, 1888, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named note being also signed and executed by the said McGuire and Tighe, and by the copartnership firm of P. B. McCarthy and Company, composed of this plaintiff and said McGuire and Tighe. That on May 22, 1889, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of the said notes above de-

scribed and including the unpaid interest accrued thereon, the plaintiff made and delivered to the defendant his certain promis-
442 sory note in writing, dated on that day and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, five thousand dollars, twelve months after said date, with interest thereon at twelve per cent per annum from June 22, 1889, until paid, said last named note being also signed and executed by said McGuire, and also by Maggie McCarthy, the then wife of this plaintiff, as a surety thereon, and being also endorsed in blank by said firm of P. B. McCarthy and Company. That thereafter, on July 22, 1891, at Rapid City, South Dakota, as a renewal of said notes above described, including $1,000 of unpaid usurious interest thereon, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, five thousand dollars, six months after said date, with interest thereon at twelve per cent per annum from said date until fully paid, said note being also executed by said Maggie McCarthy as surety; and that to secure the payment of the principal and interest mentioned in said last named note this plaintiff and Maggie McCarthy, his wife, did, at the same time and place, execute under their hands and seals, duly acknowledged and deliver to the defendant a certain mortgage bearing even date with said last named note, whereby this plaintiff and his said wife mortgaged to the defendant in fee certain lands and real estate situate in said Pennington County, and described in the said mortgage as follows, to-wit: Lots numbered fifteen and sixteen, in block numbered eighty-five, of the original townsite of Rapid City, Pennington County, South Dakota, as shown by the official plat of said Rapid City, S. D., on file in the office of the register of deeds of Pennington County, South Dakota, to-
443 gether with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining. That on July 22, 1891, at Rapid City, South Dakota, the plaintiff made and delivered to the defendant his certain promissory note in writing dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, three hundred and fifty dollars, on August 31, 1891, with interest thereon at twelve per cent per annum from date until paid, said note being also executed by said Maggie McCarthy, as surety for this plaintiff, and the same having been so made and given for the purpose of evidencing the usurious interest claimed to be due upon the said notes above described. That on February 17, 1896, at Rapid City, South Dakota, as a renewal and further evidence of the indebtedness represented by said notes above described, except said three hundred and fifty dollar note, the plaintiff made and delivered to the defendant his certain two promissory notes in writing, one for $675.50 and the other for five thousand dollars, both dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, six hundred and seventy-five and 50-100 dollars, thirty days after said date, and five thousand dollars, four months after said

date, with interest on each of said sums at twelve per cent per annum from said February 17, 1896, until fully paid. That the sole consideration of each and all of the said notes was the said original loan of four thousand dollars, and the usurious interest accruing thereon, and that each and all of the said notes subsequent to August 22, 1887, were given and made as mere renewals and extensions of or substitutes for the said four original notes of one thousand dollars each of
444 date August 22, 1887, and, together with the said mortgage, constitute one and the same transaction; copies of which said several notes, together with the endorsements thereon, are hereto annexed, marked exhibits A, B, C, D, E, F, G, H, I, J, K and L and made a part of this complaint. That at the time of the making of the said several five thousand dollar notes, of date, respectively, May 22, 1889, July 22, 1891, and February 17, 1896, the defendant, knowingly, corruptly, and usuriously reserved, charged, and included therein the sum of one thousand dollars of usurious interest upon the said original indebtedness, and that the defendant also on said February 17, 1896, knowingly, corruptly, and usuriously reserved, charged, and included in said note of six hundred and seventy-five and 50-100 dollars, of date February 17, 1896, the further sum of $675.50 as usurious interest upon said original loan and indebtedness.

III.

That on the 22d day of August, 1887, the date of said original loan, and at all times subsequent thereto, the rate of interest was fixed by the laws of the Territory of Dakota and State of South Dakota, and the highest or greatest rate of interest fixed or allowed by law in the Territory of Dakota and State of South Dakota, under the statutes in such case made and provided, was twelve per cent per annum, and at the same rate for a shorter time, and that no other or different rate of interest was then fixed, limited, or allowed by the laws of said territory or state for banks of issue organized under the laws of said territory or state.

IV.

That between August 22, 1887, and January 1, 1897, at the banking house of the defendant in Rapid City in said Pennington
445 County, the plaintiff paid to the defendant as interest upon the said indebtedness represented by said original loan and evidenced by said several promissory notes, sundry sums of money aggregating $3,802.74, and the defendant knowingly, wilfully, and corruptly demanded and received the same from the plaintiff as usurious interest, and knowingly, wilfully, and corruptly applied the same to the payment of the said corrupt and usurious interest, and endorsed the same on the said several promissory notes as interest received thereon, knowing the said interest so contracted for and demanded and retained as aforesaid, to-wit: interest at the rate of eighteen per cent per annum, to be a greater rate of interest than was allowed as aforesaid by the laws of said territory and state, and that the defendant did then and there knowingly, corruptly, and usuriously

receive and demand said several sums of money (including the said interest note of three hundred and fifty dollars), aggregating as aforesaid, the sum of $3,802.47, as and for payments of the interest which it so demanded and received on the said original indebtedness and on the said several promissory notes as aforesaid, and since has knowingly, wilfully, and usuriously applied and so made use of the said sum of $3,802.74 against the statute of the United States in such case made and provided, to-wit: Sections 5197 and 5198 of the Revised Statutes of the United States and the Acts amendatory thereof.

V.

That thereafter, to-wit: on the 26th day of January, 1897, the defendant commenced an action in the above entitled court against this plaintiff, said Maggie McCarthy and others, for the foreclosure of said mortgage and for the recovery of the amount due, by their terms, upon the said mortgage and the said note for five
446 thousand dollars of date July 22, 1891, and the said two notes of date February 17, 1896, in which said action this plaintiff, one of the defendants therein, appeared and answered setting up and alleging the foregoing facts with respect to the usurious nature of said original indebtedness and the said mortgage and the said several promissory notes, and praying that the said mortgage and the said notes of date, respectively, July 22, 1891, and February 17, 1896, be adjudged to be usurious, and be purged of the usury therein, and for other general and equitable relief. That thereafter such proceedings were had in said action that on the 18th day of May, 1901, judgment was entered in said court in favor of the said First National Bank and against this plaintiff and said Maggie McCarthy, defendants therein, whereby it was by said court considered, ordered, and adjudged that no part of the said mortgage or notes or indebtedness was unlawful or should be forfeited, or was tainted or affected with usury, and that the said First National Bank recover of this plaintiff, as principal debtor, and said Maggie McCarthy, as surety, the sum of five thousand six hundred and seventy-five and 50-100 dollars principal, with interest thereon from April 1, 1896, at the rate of twelve per cent per annum, also the sum of fourteen hundred and twenty-one and 50-100 dollars on account of taxes paid by said First National Bank upon said mortgaged premises, less $62.50, being the excess paid above what said taxes could actually have been paid and discharged for, with interest on $43.63 thereof from September 19, 1900; on $43.64 thereof from February 16, 1900; on $99.73 thereof from May 26, 1899; and on $1,234.50 thereof from March 23, 1898, all at the rate of twelve per cent per annum, and amounting
447 on said May 18, 1901, for said principal and interest thereon, and for taxes and interest thereon, to the total sum of eleven thousand one hundred and seven and 85-100 dollars as damages on account of said mortgage indebtedness mentioned in the complaint in that action, together with the costs taxed and allowed at the sum of $113.45, and amounting in all for said principal, interest, taxes, and costs, to the total sum of eleven thousand two hundred and

twenty-one and 30-100 dollars, and whereby it was by said court further ordered, adjudged and decreed that the said mortgaged premises be sold in the manner provided by law to pay and satisfy the said total amount so found and adjudged to be due to said First National Bank, plaintiff therein, from this plaintiff and said Maggie McCarthy, defendants therein, for principal, interest, taxes paid and interest thereon, and costs, and that the defendants in that action, and all persons claiming under them subsequently to the commencement thereof, be forever barred and foreclosed of all right, title, and interest and equity of redemption in and to the said mortgaged premises so directed to be sold, or any part thereof, unless the same should be duly redeemed within the time allowed by law. That thereafter, and within the time allowed by law, this plaintiff and the said Maggie McCarthy duly moved the court in said action to vacate and set aside its said decision and the said judgment entered therein, and to grant a new trial of said action, which motion was by said circuit court overruled and denied on the 14th day of December, 1901. That thereafter, to-wit: on the 21st day of December, 1901, and before this action, this plaintiff and the said Maggie McCarthy, defendants in that action, duly perfected an appeal to the supreme court of the State of South Dakota from the said
448 judgment of foreclosure and sale and from the said order denying their motion for a new trial, and from the whole and every part of the said judgment and order, and thereafter, on March 11, 1902, and before this action, the clerk of said circuit court duly made his certificate to the judgment roll and original papers in said foreclosure action and transmitted the same, with his certificate thereto attached, to said supreme court pursuant to such appeal. That thereafter, and before this action, such proceedings were duly had in said supreme court that on June 8, 1904, judgment was duly given and entered by said supreme court, whereby it was by said supreme court duly considered, adjudged, and decreed, that the said mortgage and five thousand dollar note of July 22, 1891, as well as the said two notes of date February 17, 1896, were tainted with usury, and that there was included therein the sum of $1,675.50 usurious interest, and that all the interest apparently due by the terms of said notes was unlawful and should be and was forfeited, and that the said note for $675.50, of date February 17, 1896, was given for usurious interest only upon the said original indebtedness and loan made by said First National Bank to this plaintiff, and that the said five thousand dollar note of July 22, 1891, and said five thousand dollar note of date February 17, 1896, were mere renewals of the said original four notes of one thousand dollars each, of date August 22, 1887, or substitutes therefor, and that the said several four thousand dollar notes given in 1888 and said five thousand dollar note, of date May 22, 1889, were also mere renewals of said original loan of four thousand dollars, or substitutes therefor, and that the said original loan of four thousand dollars made on August 22, 1887, as aforesaid, constituted the sole consideration for all the said subsequent notes above de-
449 scribed; that on August 22, 1887, this plaintiff duly executed and delivered to this defendant the said four notes for one

thousand dollars each, wherein he promised and agreed to pay to the defendant, the First National Bank, interest thereon at the rate of eighteen per cent per annum, and that at that time the highest lawful rate of interest under the laws of Dakota Territory where said notes were executed, to-wit: Laws of 1887, page 401, chapter 207, was twelve per cent per annum, and hence, said notes and the several renewals thereof were usurious under Sections 5197 and 5198 of the Revised Statutes of the United States, and that the said indebtedness contracted on August 22, 1887, continued by means of renewal notes down to the execution of the said note for five thousand dollars of date May 22, 1889, and constituted the consideration thereof, and that the said five thousand dollar note of July 22, 1891, was a mere renewal of said note of May 22, 1889, and was tainted with usury, the sole consideration thereof being the said original loan of four thousand dollars, and that under the said laws of Congress relating to usurious contracts of national banks the interest contracted to be paid by or under said several promissory notes was forfeited, and that the said First National Bank, plaintiff in said action, was entitled to recover of this plaintiff, the defendant therein, the sum only of four thousand dollars, the amount of the said original loan made on August 22, 1887, as aforesaid, together with taxes paid by said mortgagee upon said mortgaged property and premises, with interest on said taxes, and that a judgment be entered by said circuit court in favor of the said First National Bank, as plaintiff, against this plaintiff and said Maggie McCarthy, as defendants, for the said sum of four thousand dollars, the
450 amount originally loaned by the said First National Bank to this plaintiff, and also for the said taxes and interest upon the said taxes. That thereafter, and before this action, to-wit: on December 31, 1904, the remittitur and mandate of said supreme court, together with its said judgment and opinion and decision, were transmitted to and filed in said circuit court, and that thereafter, and before this action, to-wit: on January 12, 1905, final judgment was duly given and entered by said circuit court in said foreclosure action in accordance with the said judgment, order, and mandate of said supreme court, for the said sum of four thousand dollars, together with taxes paid and interest on said taxes, and costs of suit, less certain costs theretofore allowed to this plaintiff in that action; the aggregate amount of the said judgment as so finally entered, including taxes and interest upon the taxes, and costs, as aforesaid, being the sum of five thousand nine hundred and fifty-one and 56-100 dollars.

VI.

That thereafter, and before this action, to-wit: on the 21st day of January, 1905, this plaintiff paid to the clerk of said circuit court for the use of the defendant, the said First National Bank, the full amount of the said judgment, to-wit: five thousand nine hundred and sixty-one and 91-100 dollars, and on the same day the said judgment was duly satisfied and discharged of record.

VII.

That before this action this plaintiff duly demanded of the defendant the payment of twice the amount of the usurious interest so paid by him to the defendant, as aforesaid, to-wit: seven thousand six hundred and five and 48-100 dollars, as a penalty under
451 the provisions of Section 5198 of the Revised Statutes of the United States, which demand was by the defendant, before this action, refused, and that no part of the said interest has been paid back to this plaintiff, and that by reason of the premises the defendant is indebted to the plaintiff in the sum of seven thousand six hundred and five and 48-100 dollars, all of which is now due as aforesaid, and remains wholly unpaid.

VIII.

That by reason of the premises, and all the facts above set out, defendant became indebted to this plaintiff in the amount of $7,605.48; whereby an action accrued, according to the provisions of said Section 5198 of the Revised Statutes of the United States.

Wherefore, the plaintiff demands judgment against the defendant for the sum of seven thousand, six hundred and five and 48-100 dollars, with interest thereon at the rate of seven per cent per annum from this date, besides the costs and disbursements of this action.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Plaintiff's Attorneys.

Duly verified by plaintiff January 25, 1905.

"Exhibit A."

Rapid City, Dak., *Aug. 22d*, 1887.

$1000

When Due

11-20

452

Number

8685

Ninety days after date, I or either of us promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand dollars, at First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from date until paid, for value received.

And with Attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

P. B. McCARTHY.

(Endorsed on the back thereof as follows:)
Nov. 30 Pd. Int. to 11-20 45.00.
Filed Mar. 20, 1901. William P. Baken, Clerk of Courts, By John P. McElroy, Jr., Deputy.

"EXHIBIT B."

RAPID CITY, DAK., *Aug.* 22, 1887.

$1000

Twelve months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from date

When due

until paid, for value received, interest payable semi-annually.

And with Attorney's fees in addition to

8-22

other costs in case the holder is obliged to enforce payment at law. And we further waive all bene-

Number

fits of the Exemption Law of the Territory of Dakota.

8688

P. B. McCARTHY.

"EXHIBIT C."

RAPID CITY, DAK., *Aug.* 22*d*, 1887.

$1000

Nine months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at

453

First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from

When Due

date until paid, for value received.

And with Attorney's fees in addition to other

5-22

costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of

Number

the Exemption Law of the Territory of Dakota.

8687

P. B. McCARTHY.

"EXHIBIT D."

RAPID CITY, DAK., *Aug.* 22*d*, 1887.

$1000

Six months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at First National Bank, of Rapid City, Dakota,

When Due

with interest at Eighteen per cent per annum from date until paid, for value received.

2-22

And with Attorney's fees in addition to other costs in case the holder is obliged to enforce pay-

Number

ment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

8686

P. B. McCARTHY.

"EXHIBIT E."

RAPID CITY, DAK., *Aug. 7th*, 1888.

$4000.00

Ninety days after date, we or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, Four thousand and 00-100 Dollars, at First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from date until paid, for value received.

5-3

And with Attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And wef urther waive all benefits of the Exemption Law of the Territory of Dakota.

Number 454

11245

P. B. McCARTHY & CO.
P. B. McCARTHY.
M. McGUIRE.
D. J. TIGHE.

(Endorsed on the Back as Follows:)

Nov. 9, ac. Interest 100.00
22 Int. to 11-5 ..... 80.00
Feb'y 6 Int. pd. to 2-3 180

"EXHIBIT F."

RAPID CITY, DAK., *May 22d*, 1889.

$5000.00

Twelve months after date, we or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, Five thousand 00-100 Dollars, at First National Bank, of Rapid City, Dakota, with interest at Twelve per cent per annum from June 22nd 1889 until paid, for value received, payable quarterly

When Due

And with — Dollars Attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

Number 12-22

PATRICK B. McCARTHY.
MAGGIE McCARTHY.
MICHAEL M. McGUIRE.

13850

(Endorsed on the Back as Follows:)

P. B. McCarthy & Co.
Nov. 27, Int. Pd. to 11-22, $250.
Mch. 22, Int. pd. to 3-22-90 $200.
June 5 Int. pd. to 5-22 100.
Sept. 30, Int. paid to Sept. 22, $200.
Dec. 23, Int. paid to 12-22-90 $150.

455

"EXHIBIT G."

RAPID CITY, SO. DAK., *July* 22, 1891.

Six months after date, we or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak. Five Thousand Dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent. per annum from date until paid, for value received. $5000. When Due 12-28-95

P. B. McCARTHY.
MAGGIE McCARTHY.
Number 13850

(Endorsed on the Back as Follows:)

Feb'y 8th 92 Pd. ac. Int	$76.65
Feb'y 29th 92 Pd. ac. Int	45.00
April 28th 92 pd. ac. Int	69.28
Aug. 16 92, Pd. ac. Int. by Hill	60.00
Aug. 18 92, Pd. ac. Int. (Hill)	40.00
Sept. 3rd 92 pd. to ac. Int. Hill	35.00
Sept. 10 92 pd. ac. Int. Hill	15.00
Jan'y 16 93 pd. on Int	30.00
Feb'y 1st 93 pd. on Int	50.00
March 11th 93 pd. on Int	40.00
March 13 93 pd. on Int	10.00
April 10 93 pd. on Int	50.00
May 3 93 pd. on Int	55.00
May 13 93 Pd. on ac. Int. Hill by Challis	25.00
May 13 93 Pd. on ac. Int. Hill by Challis	25.00
June 6 93 Pd. on ac. Int	50.00
July 10 93 Pd. on ac. Int	50.00
July 25 93 pd. ac. Int (Keenan)	25.00
Oct. 5 93 pd. on ac. Int	25.00
Nov. 16 93 pd. on ac. Int	25.00
Dec. 23 93 Pd. on ac. Int	20.00
Jan'y 20 94 Pd. on ac. Int. (Keenan)	84.40
Jan'y 26 94 Pd. on ac. Int. (Joe Wallace)	63.25
456 Feb'y 6 94 " " " " (Keenan)	40.00
March 3 94 " " " " "	40.00
April 4 94 " " " " "	40.00
May 2 94 " " " " "	40.00
June 5 94 " " " " "	19.50
July 11 94 " " " " "	12.25
Sept. 18 94 by Keenan rent ac. Int	27.75
Oct. 5 94 by cash (horse note) ac. Int	19.50
Oct. 11 94 cash ac. Int. (Keenan rent)	10.00
Nov. 9 94 " " " " "	25.00
Dec. 4 94 " " " " "	25.00
Dec. 29 94 " " " " "	1.60
Jan'y 16 95 by " ac. Int. (Tracey & S.)	15.00

Feb. 11 95 by " ac. Int. (Tracey & S.)	15.00
March 20 95 by " ac. Int. (Keenan)	25.00
April 2 95 by " ac. Int. (Keenan)	25.00
May 6 95 by " ac. Int. (Keenan)	25.00
June 1 95 by " ac. Int. (Keenan)	25.00
July 1 95 " " " " (Keenan)	25.00
Aug. 12 95 " " " " (Keenan)	25.00
Sept 2d 95 " " " " (Keenan)	25.00
Oct. 2 95 " " " " (Keenan)	25.00
Nov. 11 95 " " " " (Keenan)	25.00
Nov. 30 '95 Pd. cash Int. (Franklin Judg.)	500.65
Dec. 12 95, Pd. cash ac. Int. (Keenan)	25.00
Jan. 2 96, Pd. cash ac. Int. (Keenan)	12.50

"EXHIBIT H."

RAPID CITY, SO. DAK., *Feb'y* 17, 1896. $5000

Four months after date, we or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak. Five thousand dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent. per annum from date until paid, for value received. When Due 6-17 Number

PATRICK B. McCARTHY. 25245
PATRICK B. McCARTHY. 24245

457 (Endorsed on the back as follows:)

July 1, '96, Pd. on Int. (Smith & Brown)	$30.00
Nov. 25th '96, Pd. on Int.	$50.00

Total number of indorsements of payments is 60.

"EXHIBIT I."

RAPID CITY, SO. DAK., *Feb'y* 17, 1896.

Thirty days after date, we or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak., Six hundred seventy five & 50-100 Dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent. per annum from date until paid, for value received. $675.50 When Due Number Int. on

PATRICK B. McCARTHY.
MRS. MAGGIE McCARTHY. 13850

Answer.

Which complaint the defendant answered, setting up the following defenses:

The defendant, as and for its answer and defense to the plaintiff's complaint herein, says and alleges:

First.

It admits that the defendant is a corporation, doing business at Rapid City, South Dakota, as alleged in the first paragraph of the complaint; also that the plaintiff made to the *plaintiff* his four promissory notes in writing on or about August 22, 1887 for the sum of one thousand dollars each, in substantially the form as alleged in the second paragraph of the complaint; that the plaintiff and Maggie McCarthy were hubsand and wife as alleged in the complaint; and that plaintiff and Dennis J. Tighe and Michael McGuire were co-partners doing business at Rapid City under and by the firm name and style of P. B. McCarthy & Co., that on or about July 22, 1891,
458 the plaintiff and Maggie McCarthy his wife made their certain promissory note to the defendant for the sum of $5,000, and thereby promised to pay to the defendant at Rapid City, S. Dak., four months after date said sum of $5,000 with interest at twelve per cent per annum, and to secure the payment thereof made and delivered to the defendant their certain mortgage upon lots fifteen and sixteen in Block 85 of the original townsite of Rapid City, in Pennington county, State of South Dakota; that afterwards and on or about February 17, 1896, the plaintiff and Maggie McCarthy his said wife, made their two notes to the defendant for $5,000 due in six months after date and for $675.00 due in thirty days after date, each bearing twelve per cent per annum interest from date until paid. Admits that all payments of interest made by the plaintiff or other parties on account of the several notes mentioned in the complaint were made between August 22, 1887, and January 1, 1897, and alleges that the last of all such interest payment- was made on November 25, 1896.

Defendant further admits that on or about January 26, 1897, the defendant commenced an action in the above named court against the plaintiff Patrick B. McCarthy, Maggie McCarthy his wife and other parties to foreclose said mortgage above mentioned, and that such proceedings were had in such action that judgment was rendered therein in favor of this defendant and against said plaintiff and other co-defendants in said action for the sum of $11,221.30 for principal, interest, taxes and costs of action, and said mortgaged premises therein mentioned were decreed to be sold to satisfy the same; that afterwards an appeal was taken from said judgment by the plaintiff herein and his co-defendants in said action to the su-
459 preme court of this state, and that upon said appeal such proceedings were had that said judgment was modified and said cause remanded with direction to enter judgment for $4,000 and for taxes paid by this defendant with interest thereon and costs of action, and that thereafter judgment was so entered in the sum of $5,961.91 on or about January 12, 1905. (The "VI" paragraph or court of the complaint having been stricken out by an order of this court made and entered February 17, 1905, as redunda-te and irrelevant, no plea is interposed to the allegations therein contained). Defendant also admits that before this action plaintiff demanded from this defendant the payment of $7,605.48 to-wit, twice $3,602.74 alleged usurious interest claimed to have been paid by plaintiff to

this defendant under the provisions of Section 5198 of the Revised Statutes of the United States, which demand was by this defendant refused.

Second.

Defendant denies each and every statement, allegation and averment in said complaint contained, which is not hereinbefore specifically admitted. And specifically denies that this defendant became or is now indebted to the plaintiff in the sum of $7,605.48 or any other sum or amount whatsoever, or on account of facts set forth in the complaint, or on any other account whatsoever.

Third.

And for a further and affirmative defense to the complaint herein, defendant alleges that the several payments therein alleged to have been made by the plaintiff to the defendant and which are alleged as the basis of the plaintiff's cause of action or causes of action against this defendant, were not made and said causes of action did not accrue within six years next preceding the commencement of this action.

460

Fourth.

And for a further and affirmative defense to the complaint herein, defendant alleges that the several payments therein alleged to have been made by the plaintiff to the defendant and which are alleged as the basis of the plaintiff's cause of action or causes of action against this defendant, were not made and said causes of action did not accrue within three years next preceding the commencement of this action.

Fifth.

And for a further and affirmative defense to the complaint and to the cause of action or causes of action therein set forth, this defendant alleges that the said payments and the said transactions in the complaint mentioned and which are the basis of the plaintiff's cause of action or causes of action, were not made nor did they occur within two years before the commencement of this action, and the cause or causes of action set forth in the complaint did not accrue within two years next before the commencement of this action; and said cause or causes of action and each thereof is barred by Section 5198 of the Revised Statutes of the United States and the acts amendatory thereof.

Wherefore, defendant prays judgment that the complaint of the plaintiff be dismissed, and that the defendant have and recover of the plaintiff its costs and disbursements in this action.

BUELL & GARDNER AND
FRED H. WHITFIELD,
Attorneys for the Defendant.

Duly verified by the president of defendant February 23, 1905.

On the 1st day of February, 1905, and prior to the calling
461 of said action for trial the defendant's attorneys served upon the plaintiff's attorneys the following notice of motion:

Notice of Motion.

Please take notice: That the undersigned will move the above named court at the chambers thereof at the court house in the City of Rapid City, in said judicial circuit on the 7th day of February, A. D. 1905, at the hour of two o'clock p. m. of said day, or as soon thereafter as counsel can be heard, for an order striking out all the fifth paragraph of the complaint herein, also all of the sixth paragraph of the complaint here, as irrelevant and redundant.

This motion will be made upon the record, pleadings and proceedings herein.

Dated at Rapid City, South Dakota, this 28th day of January, A. D. 1905.

Yours, etc.,

FRED H. WHITFIELD AND
BUELL & GARDNER,
Attorneys for Defendant.

To Messrs. Schrader & Lewis and Charles W. Brown, Attorneys for the Plaintiff."

Date of filing of above Notice of Motion February 1, 1905, at 11 o'clock, a. m., by J. S. Gantz, clerk.

Thereafter on the 17th day of February, 1905, and before the calling of said case for trial, the said motion came on for hearing and was argued by counsel, and thereupon the court on the said 17th day of February, 1905, made and entered the following order and ruling upon said motion:

Order.

"This matter having been brought on regularly for hear-
462 ing, pursuant to notice of motion made by the said defendant for an order striking out all of the fifth and sixth paragraphs of the complaint herein, as irrelevant and redundant, which said motion was noted for hearing on the 7th day of February, 1905, but by agreement of counsel adjourned to and until the 10th day of February, 1905, at the hour of two o'clock, p. m., of said day at which time said motion was duly heard by the court; Fred H. Whitfield, Esq., and Messrs. Buell & Gardner appearing in support of said motion, and Charles W. Brown, Esq., and Messrs. Schrader & Lewis in opposition thereto; and the court having heard the argument of counsel and duly considered the same, and being fully advised in the premises, and being of the opinion that all of the sixth paragraph of the complaint should be stricken out as irrelevant and redundant.

Ordered That all of the sixth paragraph of the plaintiff's complaint herein, in the following words, viz.:

"That thereafter and before this action, to-wit, on the 21st day of January, 1905, this plaintiff paid to the clerk of said circuit court, for the use of the defendant, the said First National Bank, the full amount of the said judgment, to-wit, $5,961.91, and on the same day the said judgment was duly satisfied and discharged of record."

Be and the same hereby is stricken out as irrelevant and redundant.

Dated this 17th day of February, A. D. 1905.

By the Court.

LEVI McGEE, *Judge.*

Attest:

J. S. GANTZ, *Clerk.*

[Seal of the Circuit Court.]

463 Exception on back of said order and ruling as follows, viz.:

"To which order and ruling of the court the plaintiff at the time duly excepted, and at his request said exception is allowed and signed by the court.

By the Court.

LEVI McGEE, *Judge.*

Attest:

J. S. GANTZ, *Clerk.*

[Seal of the Circuit Court.]"

On the 30th day of March, 1905, said cause was tried by a jury, and on the trial the following proceedings were had as shown by the following:

Statement of the Case.

Be it remembered that the issues in this action came on for trial before the Honorable Levi McGee, judge of said court, at a regular term of said circuit court held at the court house in Rapid City in said county on the 30th day of March, A. D. 1905, Mr. Charles W. Brown and Messrs. Schrader & Lewis appearing as attorneys for plaintiff, and Mr. Fred H. Whitfield and Messrs. Buell & Gardner appearing as attorneys for defendant; a jury was called and sworn, and the plaintiff by his counsel opened the case.

The plaintiff, then, to maintain the issues upon his part called as a witness Jacob S. Gantz, who, being examined by Mr. Schrader, testified as follows:

I am and have been the clerk of courts of said Pennington county and as such have had the charge and custody of all the books, papers and records of said circuit court.

The witness then produced and identified the papers and records marked by the court reporter for identification Exhibits numbered 1 to 36, both inclusive (except Exhibit 14, which was not
464 offered) and hereinafter described, and testified that the same are the papers and records contained in and constituting the judgment roll in that certain foreclosure action commenced in said court on or about the 26th day of January, 1897, by said First

National Bank of Rapid City, as plaintiff, against said Patrick B. McCarthy, Maggie McCarthy, and others as defendants, and twice thereafter appealed from said circuit court to the supreme court of South Dakota.

Said Exhibits numbered 1 to 36 both inclusive, except said Exhibit 14, were offered by the plaintiff and were received and read in evidence; the true copies thereof are hereto annexed and made a part of this Statement of the Case. And said exhibits are further described as follows.—Ex. 1, Summons; Ex. 2, Notice of No Personal Claim; Ex. 3, Complaint, Ex. 4, Separate Answer and Disclaimer of defendant Milton Frease, Ex. 5, Decision of Court of date May 4, 1897, containing its findings of fact and conclusions of law, Ex. 6, Judgment of date May 4, 1897, Ex. 7, Notice of Intention to Move for a New Trial, Ex. 8, Notice of Motion for a New Trial, dated June 8, 1898, Ex. 9, Order Granting New Trial of date June 18, 1898; Ex. 10, Notice of Appeal of date July 21, 1898, Ex. 11, Undertaking upon Appeal of date July 21, 1898, Ex. 12, Supreme Court Remittur dated August 11, 1900, and filed in said circuit court August 16, 1900, Ex. 13, Amended and Supplemental Complaint of date October 1, 1900, Ex. 15, Amended Separate Answer of Patrick B. McCarthy and Maggie McCarthy to Amended and Supplemental Complaint, dated February 27, 1901, Ex. 16, Reply to Separate Amended Answer of Patrick B. McCarthy and Maggie McCarthy, of date March 4, 1901, Ex. 17, Order of Court
465 submitting certain questions to jury, dated March 8, 1901; Ex. 18, Verdict of July filed March 20, 1901; Ex. 19, Notice of Intention to Vacate Verdict of Jury of date April 3, 1901; Ex. 20, Order of date May 18, 1901, Denying Motion to Vacate Verdict of Jury; Ex. 21, Decision of Court of date May 18, 1901, containing its Findings of Fact and Conclusions of Law; Ex. 22, Judgment of date May 18, 1901; Ex. 23, Notice of Intention to Move for a New Trial of date June 24, 1901; Ex. 24, Bill of Exceptions of date September 20, 1901; Ex. 25, Certificate of Settlement of Bill of Exceptions, dated November 9, 1901; Ex. 26, Notice of Motion for a New Trial dated November 11, 1901; Ex. 27, Order of date December 14, 1901, overruling and denying Motion for a New Trial; Ex. 28, Order of date December 17, 1901, fixing amount of supersedeas undertaking upon appeal; Ex. 29, notice of Appeal, dated December 19, 1901; Ex. 30, Undertaking upon Appeal, dated December 19, 1901; Ex. 31, Stipulation as to the death of Maggie McCarthy pending said action, and order substituting her administrator as a defendant in her stead, dated January 11, 1905; Ex. 32, Notice of Motion for Judgment in accordance with Decision of Supreme Court; Ex. 33, Remittitur of Supreme Court on Second Appeal dated June 8, 1904, and filed in the circuit court December 27, 1904; Ex. 34, Order of Supreme Court denying Petition for a rehearing of date November 30, 1904; Ex. 35, Opinion and Decision of Supreme Court returned with the Remittitur and filed in the supreme court June 8, 1904; Ex. 36, Final Judgment and Decree of Foreclosure and Sale as modified by the Supreme Court upon Appeal, and dated January 11, 1905.

The witness further testified:

466 I have here Judgment Docket No. 4 of the circuit court of Pennington county, South Dakota, on page 185 of which is a docket of this judgment and decree of foreclosure and sale as modified by the supreme court on appeal.

Q. You may state to the court and jury the record you have there with reference to this judgment, judgment found on page 185 of Judgment Book of Circuit Court, Pennington county, South Dakota, Book 4?

A. Patrick B. McCarthy, et al, judgment debtor, First National Bank of Rapid City, South Dakota, judgment creditor; amount of judgment, damages and costs, $5,951.56; date of judgment, January 12, 1905; when filed, January 12, 1905, nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; Judgment Book No. 11, page 350; Name of Court, Circuit; Attorneys of Judgment Creditor, Fred H. Whitfield; Satisfaction of Judgment Record No. 2, page 11; Fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of court.

(The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court and objects to the payment or satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out.)

(The plaintiff now asks leave to show by the record offered that as it appears upon the margin, the payment and satisfaction of judgment on the 21st day of January, 1905, and the receipt that the judgment was fully satisfied as appears in this record January 21, 1905, by payment of $5,961.91, signed J. S. Gantz, clerk of court.

The defendant objects for the reason that the entry is

467 secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings.

(Objection sustained to which ruling the plaintiff duly excepted.)

Q. As clerk of courts, I will ask you if on the 21st day of January, 1905, you were not paid as clerk of this court $5,961.91 in satisfaction of this judgment, in full payment of the judgment, interest and costs to that date?

(The defendant objects as calling for a conclusion of the witness, impertinent, and for all of the reasons offered to the same evidence—counsel knowing from the ruling of the court that it is inadmissable.

Objection sustained to which ruling the plaintiff duly excepted.)

By Mr. Lewis:

"The plaintiff moves the Court to set aside the order heretofore made and filed in this action striking out the sixth paragraph of the complaint as being inadvertently done, and said sixth paragraph being necessary for the full and complete maintenance and

presentation of plaintiff's cause of action and the evidence to support the same; that this action being for a statutory penalty under sections 5197 and 5198 of the Revised Statutes of the United States, and the final judgment for the principal sum loaned having been duly rendered in this court January 12, 1905, and duly filed and entered herein, and as is claimed by the plaintiff in this
468 action duly paid and fully satisfied on January 25, 1905, as shown by the record of satisfaction of said judgment, and as claimed by the plaintiff all payments of principal and usurious interest on said original loan not having equalled the sum of four thousand dollars originally loaned and recovered in the judgment mentioned and described in paragraph five of the complaint—the plaintiff claims that the two years statute of limitations to commence an action for the recovery of such penalty provided in the statutes of the United States above referred to from the date of the transaction, did not commence until January 21, 1905—the payment as claimed by the plaintiff of said judgment, and that it is necessary for the plaintiff to show that such judgment was rendered and paid before the plaintiff is entitled to maintain the action, and the plaintiff asks that said sixth paragraph of the complaint be reinstated and that the plaintiff be allowed to give evidence covering the facts alleged in the said sixth paragraph for the reasons above stated."

Which motion was by the Court overruled, to which ruling the plaintiff at the time duly excepted.

By Mr. LEWIS:

"The plaintiff asks that the record show at this point that the plaintiff excepts to the ruling of the court, the same being contrary to the law of this state and to the statutes of the United States and particularly Section 5198 of the Revised Statutes of the United States which controls all questions in regard to the recovery of penalties of this nature and prescribes the same. Plaintiff insists that the cause of action did not accrue in this case until such payment and the statute of limitations did not begin to run until that time, and that it is necessary for plaintiff to show these facts to maintain his cause of action."

469 Which request for an exception was by the Court allowed.

Q. Mr. Gantz, I notice that in the judgment docket four of Pennington county on page 185 and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head "satisfaction, remarks, etc." page 185, you have just entered "fully satisfied January 21, 1905, by payment of $5,951.91, J. S. Gantz, clerk of court;" I will ask you whether or not you paid that money to the plaintiff?

(The defendant objects to the question as cumulative, and calling for a conclusion of the witness, and as assuming a fact not in evidence, and as incompetent, irrelevant and immaterial for all of the reasons stated in the former objection to the offer of proof relative to payment of this or any other judgment.

Objection sustained by the Court, to which ruling the plaintiff at the time duly excepted.)

By Mr. LEWIS:

"The plaintiff excepts to the ruling of the Court for all of the reasons last noted under the last previous question, and for the further reason that before the plaintiff can—that it is necessary as a part of the plaintiff's cause of action to introduce evidence of the judgment and payment thereof."

Which exception is allowed by the Court.

(The plaintiff then offered in evidence all that part of page 185 of the judgment docket of Pennington county, Judgment Docket No. Four of the Circuit Court of said Pennington county, relating to said judgment of the First National Bank of Rapid City, South Dakota, v. Patrick B. McCarthy, et al., as it there appears of
470 record.

The defendant objected to the same as cumulative, and for all of the reasons above noted to this class of testimony, not repeated for the sake of saving the record of needless encumbrance.

Which objection was by the Court sustained, to which ruling the plaintiff duly excepted.)

By Mr. LEWIS:

"The plaintiff excepts to the ruling of the court, for the reason that it is necessary to show the transaction, and that the judgment in controversy was fully paid, and as necessary to the maintenance of his cause of action, and is competent and relevant and material to the issues in this action, and asks that this may be added to the exceptions heretofore taken by the plaintiff to the rulings of the court; the plaintiff excepts upon all the grounds heretofore made herein a matter of exception by him upon the questions propounded to the witness Gantz with reference to the payment or satisfaction of the judgment."

Which exception was by the court allowed and thereupon the witness was excused.

P. B. MCCARTHY, sworn as a witness on his own behalf and examined by Mr. Schrader, testified as follows:

My name is Patrick B. McCarthy; age forty-eight years; residence Rapid City, Pennington county, South Dakota. I am the plaintiff in this action and know the defendant the First National Bank, and I am acquainted with James Halley and H. W. Somers. Mr. Halley is president of the First National Bank and Mr. Somers is cashier. I have known Mr. Halley since 1880 and have known the defendant corporation here since its establishment in
471 Rapid City. I guess it is 1881 or 1882; there was a bank established here known as Lake, Halley and Patterson, and Mr. Halley was a member of that and later it was established as the First National Bank; that was about the year 1884. Mr. Halley has been engaged with that bank ever since its organization up to the present time and is now connected with it. He has been connected with the defendant bank during the time I have known Mr. Halley

and the bank as cashier and later on as president. I am the same Patrick B. McCarthy who was one of the defendants in an action entitled in this court The First National Bank of Rapid City, v. Patrick B. McCarthy, et al. That is my signature to all of these notes (referring to Exs. 37, 38, 39 and 40); it was placed there the same date these notes were made. The endorsements of interest on the back of these papers are in Mr. Halley's handwriting and at the time that these endorsements were made Mr. Halley held the position of cashier in the First National Bank, the defendant here. These four papers, Exs. 37, 38, 39 and 40, are the same notes referred to in the decision of the supreme court in the case of the First National Bank of Rapid City v. Patrick B. McCarthy, et al., and introduced in evidence at that time. That is my signature upon the paper that has been marked for identification Ex. 41. My signature was placed there at the time the note was made, the same date. The endorsements of interest that are upon the back of that paper Ex. 41 are in Mr. Halley's handwriting. Mr. Halley held the position of cashier in the defendant bank at the time that these various endorsements were made. This paper, Ex. 41, is one of the notes referred to by the supreme court in its decision in the case of the First National Bank of Rapid City, South Dakota, v. Patrick B. McCarthy, et al.

472 Referring to the paper that has been marked for identification Ex. 2, that is my signature and my signature was put there the same date the note was made; all of the endorsements of interest that appear upon the back of that paper are in Mr. Halley's handwriting, and at the time these several endorsements of interest were made on this Ex. 42, Mr. Halley held the position of cashier in the defendant bank. This Ex. 42 is one of the identical notes referred to by the supreme court in its decision and is one of the notes given in the transaction between Patrick B. McCarthy and the First National Bank of Rapid City, South Dakota, in the case of the First National Bank of Rapid City, South Dakota, against Patrick B. McCarthy, et al.; it is the identical note referred to there. Referring to this paper that has been marked for identification Ex. 43, that is my signature to that note and it was placed there the same date the note was made. The signature of Maggie McCarthy there, who is my wife, is in her handwriting and was put there on the same day the instrument bears date, but it was done at the hotel if I remember correctly; I think Mr. Somers brought this note down to the hotel for my wife to sign. The endorsements of interest that appear upon the back of that paper, Ex. 43, are all in Mr. Halley's handwriting and Mr. Halley at the time those several endorsements of interest were made held the position of cashier in the defendant bank. That, Ex. 43, is the identical instrument, identical note upon which the action of foreclosure was based in the case of the First National Bank of Rapid City, South Dakota, v. Patrick B. McCarthy and others, and that is the identical note referred to by the supreme court in its decision in that case and the note upon which the foreclosure was based. Referring again to the note, Ex. 42, the name Mag-

473 gie McCarthy that appears upon that instrument is in my wife's handwriting and was put there at the time this note was made. Referring now to this instrument marked for identifica-

tion Ex. 44, that is my signature to it, and the signature of Maggie McCarthy is in my wife's handwriting and these signatures were placed there at the same time that the instrument bears date. Let me correct myself: I think that (the note Ex. 43) was made a day or two ahead of the time that the mortgage was signed; my wife was not ready to go on that day, if I remember correctly. This paper, marked for identification Ex. 44, is the mortgage that was given to secure this paper Ex. 43, and which is referred to by the supreme court in its decision in the case heretofore mentioned. That is my signature to this note marked for identification Ex. 45, and it was placed there at the same time the note was made. The name Maggie McCarthy there is in my wife's handwriting and was placed there at the same time as the date of the instrument. The endorsements of interest that appear upon the back of that instrument, Ex. 45, are in Mr. Halley's handwriting and Mr. Halley was then cashier of the defendant bank on or about the dates that these several endorsements bear date, and that note, Ex. 45, is one of the identical notes referred to by the supreme court in its decision already mentioned. Referring to this paper marked for identification Ex. 46, that is my signature to that paper and my signature was placed there on the same day as the date of the instrument, and the signature Mrs. Maggie McCarthy is in my wife's handwriting and was placed there at the same time as the date of the instrument, and that is one of the identical notes referred to by the supreme court in its decision heretofore mentioned.

474 At the trial of the case of the First National Bank of Rapid City, South Dakota, v. Patrick B. McCarthy, et al., there was a $350.00 interest note of date July 22, 1891, signed by myself and Maggie McCarthy, payable to the First National Bank of Rapid City, South Dakota, on August 31, 1891, for value received at twelve per cent per annum from date until paid. I do not know what became of that note; it was mislaid as far as I know. I have made a search and caused a search to be made in and among the papers on file here in court and made a search among my own papers for the purpose of finding this particular note, and I did not find it. That $350.00 note was one of the notes referred to by the supreme court in its decision in the case already mentioned, and the notes that are represented by Exhibits 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, and the note of $350.00 of date July 22, 1891, payable to the First National Bank of Rapid City, South Dakota, on August 31, 1891, with 12 per cent per annum interest from date until paid, for value received, signed by Patrick B. McCarthy and Maggie McCarthy, were all connected with one transaction with the bank, they are all one and the same transaction. The exhibits from 37 to 46 inclusive, omitting Ex. 44, were the originals and the renewal notes of the original transaction. The exhibits marked for identification Exhibits 37, 38, 39 and 40 were the original transaction. These notes are the commencement of this whole transaction and were delivered to the bank at that time and I got from the bank on account of them $4,000.00. The Exhibits 41, 42, 43, 45 and 46, are the renewals of the first four exhibits to which my attention has been called. These renewals included the accrued interest and unpaid principal and

these exhibits to which you have just called my attention,
475 from 37 to 46, with the exception of Ex. 44, were all embraced in and adjudicated in the case of the First National Bank of Rapid City versus Patrick B. McCarthy and others. The $4,000.00 for which the exhibits 37, 38, 39, and 40 were given was the only consideration that I received for the giving of all of these notes; that was the only money I received from the bank. All of the endorsements of interest paid to the bank at the various times that they appear to have been paid by the endorsements on these notes, were paid out of my individual funds; checks mostly, and some in money. Referring to the endorsements appearing upon the paper marked for identification Exhibit 43, and the paper attached thereto, these payments were made from my funds, by myself or by persons authorized to make them for me. Looking at the papers marked for identification Exhibits 40, 41, 42 and 45, the endorsements of interest thereon were paid by me out of my individual funds or by persons authorized by me out of my funds to the bank. No portion of this interest money that appears to have been paid as interest endorsed on the back of these instruments to which my attention has been called, has ever been paid back to me by the bank. Before the commencement of this action a demand was made for the repayment of this interest, and the interest has not been repaid since the demand. In the judgment referred to in the case of the First National Bank of Rapid City versus Patrick B. McCarthy and others, no portion of the interest which I have paid and which appear by the endorsements on these several exhibits, was credited on that judgment or on the principal indebtedness included in said judgment.

(The plaintiff then offered in evidence Exhibits 37, 38, 39,
476 40, 41, 42, 43, 44, 45, 46, being all of the exhibits identified by the witness Patrick B. McCarthy, together with all the endorsements thereon, and the said several exhibits, together with said several endorsements were received in evidence and read to the jury; and the true copies of said several exhibits together with the various endorsements thereon, are hereto annexed and made a part of this statement of the case; and true copies of said notes with the various endorsements thereon, are also annexed to the plaintiff's complaint as a part thereof.)

(Witness continuing:)

That is my signature to this paper marked for identification Ex. 47-*a*.

Cross-examination:

Upon cross-examination by Mr. Whitfield, defendant's counsel, the witness further testified as follows:

Yes, I made the payments of interest endorsed upon these notes from my own funds, or caused other people to make them from my personal funds. I do not now recall the circumstances of the payment of the item of interest upon Ex. 40, November 30, paid interest to November 20, $45.00. There was at one time a firm known as P. B. McCarthy & Company, composed of myself, D. J. Tighe and

Michael McGuire. That co-partnership began in 1888, if I remember correctly, and did business under the firm name of P. B. McCarthy & Company. The property which they held in that name was the International Hotel and the bar room connected with it; part of the time we didn't run the bar; prohibition set in and we quit; this payment here might have been made by a check signed by P. B. McCarthy & Company; I could not say; but it was my money;

477 I could not state now any one of these several payments (referring to endorsements upon Exhibit 42) which were not made by P. B. McCarthy & Company, signed in that way and drawn from the bank funds of P. B. McCarthy & Company; but they were all made during the time the firm of P. B. McCarthy & Company existed. I refer to the payments shown on Exhibit 42.

(By Mr. WHITFIELD:

Q. Mr. Brown, have you the exhibits there we used in the former case, nineteen, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six and thirty-two, being checks used and set out in the transcript?

By Mr. BROWN:

I think so.)

(Witness continuing:)

The endorsement of the item of $150.00 December 23, 1890, was made in Mr. Halley's handwriting to the best of my recollection. All of these payments were made by me personally with one exception, and Mr. Tighe took a check and made one payment at my request out of my funds. Still referring to that item of $150.00, I do not remember whether Michael McGuire paid that himself with a company's check.

Q. I will ask you if on the former trial of this case you did not testify now, Mr. McCarthy, that on or about December 22, 1890, shortly before Christmas, 1890, M. McGuire paid $150.00 to the bank on this indebtedness, and did you not answer "Yes, sir, that was before the co-partnership expired and Halley as usual was rounding us up for money, and says 'I can't get money on this indebtedness,' and says 'you give me some money' and he got the money in a note or a check."—did you so testify?

478 A. I don't remember.

Q. Do you remember whether Mr. McGuire paid that check or not?

A. I do not; it was under my direction that it was paid.

Q. Referring to the $200.00 item dated September 22, 1890, just above that; do you know when that was paid?

A. There is no date on this note; September 30,—.

Q. September 30; would you swear that was not paid by a company check?

A. No, it was not two hundred dollars; yes, it was drawn off here on the margin; that was paid by my money.

Q. I will ask you if it was not paid by a company check. Calling your attention to the Exhibit 42 which you hold, I show you a check

marked Exhibit 23 in the former trial, dated November 27, 1889, for the two hundred and ten dollars, and ask if it does not correspond to the first item endorsed upon Ex. 42 in this case?

A. Yes, sir.

Q. How is that check signed?

A. P. B. McCarthy & Company by McCarthy.

Q. I now call your attention to the next endorsement of $200.00 of March 22, 1890, and I will show you in that connection a check dated March 22, 1890, for two hundred dollars, and ask you to state by whom that check was signed?

A. By P. B. McCarthy & Company, paid by McCarthy.

Q. I now call your attention to the next item of one
479 hundred dollars of date June 5, 1890, and ask by whom that was signed?

A. P. B. McCarthy & Company by McCarthy.

Q. I now call your attention to the next item, September 22, 1890, and ask you to state if upon the former trial of this case you did not testify that that was paid by a check signed by P. B. McCarthy & Company; I will ask you if that was not your testimony now, Mr. McCarthy; I will ask you if you did not have a check at the time of the last trial, dated September 30, 1890, for two hundred dollars now lost, and that you answered "I had a check but I don't know as I had it at the time of the last trial; I had had it there before this trial and mislaid it somewhere; September 30, 1890, for two hundred dollars?

A. Yes, sir.

Q. That was made by whom?

A. By P. B. McCarthy & Company.

Q. Did you not so testify?

A. I don't remember now; if the record says it I guess I testified to it.

Q. If the record says so you would think that the record was probably correct?

A. Yes, sir.

Q. Calling your attention to the $150.00 item, the last one on the exhibit you hold; do you know by whom that was paid.

A. I do not know what individual, but it was paid under my direction.

Q. Did the other members of the firm of P. B. McCarthy & Company draw checks on the First National Bank?

A. I don't think so; Mr. Tighe did once at my request.

480 Q. Did M. McGuire?

A. Not unless at my request.

Q. Do you know Mr. McGuire's handwriting?

A. Yes, sir.

Q. I call your attention to Ex. A, a check dated Rapid City, Dakota, December 23, and without the year dated, signed P. B. McCarthy & Company; in whose handwriting was that, if you know?

A. That looks to be McGuire's handwriting.

Q. And the cancellation stamp is December 23, 1890; I will

ask you to state if it does not correspond with the endorsement of one hundred and fifty dollars on Ex. 42?

A. It does not because the 1890 ain't on this check.

Q. The 90 is in the cancellation stamp?

A. Yes, December 23, 1890.

Q. State if that does not correspond with that entry?

A. Halley must have been a poor banker to receive a check without a date on it.

Q. State if it does not correspond with the endorsement?

A. The cancellation stamp corresponds with the interest paid on the note.

Q. The date of the note and the date of the cancellation stamp correspond?

A. The amount of the check corresponds with the interest paid on this note at that date.

Q. Do you remember giving Mr. McGuire directions to
481 pay that?

A. No, I don't remember, but if he paid it for me it was at my request.

Q. I will ask you, now, to cover the whole ground, if the five endorsements shown upon Ex. 42, are not all shown to have been paid by checks of P. B. McCarthy & Company, except one which you swear in your former testimony was by P. B. McCarthy & Company; I will ask you if all the endorsements upon the back of this note, Ex. 42, are not shown to have been paid by checks signed by P. B. McCarthy & Co., except one?

A. By McCarthy except one endorsement.

Q. Signed by P. B. McCarthy & Company checks except endorsement of September 30, for which the check was lost, and your testimony in the former case stated it was signed by P. B. McCarthy and Company by you?

A. Yes, sir.

The firm of P. B. McCarthy & Company had written articles of co-partnership. I did have a copy of the articles up to the time I foreclosed the mortgage on them. I have not got it now. McGuire and Tighe purchased each a one-third interest in the hotel property and gave their notes secured by a mortgage upon their interest to secure me for the purchase price; and they held their interest until I foreclosed them subsequently.

Referring to the endorsement upon the back of Exhibit 43, $500.65, under date of November 30, 1895, there was a payment of that amount made by my attorney Mr. Brown, to the bank in the judgment against Mr. Franklin for you people.

Q. I will ask you to state if that judgment was not en-
482 tered in an action brought by P. B. McCarthy and Company?

(The Plaintiff objects to that as those notes are not signed by P. B. McCarthy and Company. The exhibit is signed by P. B. McCarthy and Maggie McCarthy, and the Company is wholly irrelevant and immaterial and frivolous because it could not possibly be shown that that payment was made by somebody not bound by the notes;

he is the only obligor upon that note, and payment upon that note is his payment no matter how it was paid. Objection sustained. Excepted to.)

Q. For the purpose of the record, I ask you if it is not true this indorsement of $500.65 was not the net proceeds of a judgment obtained in the circuit court of this county wherein P. B. McCarthy & Company, composed of the plaintiff here and Michael McGuire and Dennis J. Tighe were members against Jennie Franklin or William Franklin, or both, and that this money was paid upon that judgment to the bank under an assignment made by P. B. McCarthy & Company and delivered to the bank?

(The plaintiff makes the same objection as last noted. Objection sustained. Defendant excepts.)

Q. Now, Mr. McCarthy, calling your attention to Ex. 41 in this suit, a note for $4,000.00, I will ask you if the first endorsement of one hundred dollars was not paid by a check signed by P. B. McCarthy & Company, dated November 9, 1888, and in that connection I show you a check which was Ex. 19 in the former action, and will ask you to state if it does not correspond to that payment and was not the check by which that payment was made?

A. Yes, sir.

Q. How was that check signed?

A. P. B. McCarthy & Company; it is in my handwriting;
483 I made out the check.

Q. Calling your attention to the next payment of eighty dollars upon that note, Ex. 41, I call your attention to a check known in the former action as Ex. 33, dated November 22, 1888, and ask you to state if that does not correspond to the endorsement?

A. Yes, sir.

Q. How was that check signed?

A. P. B. McCarthy & Company.

Q. That is not your handwriting?

A. That is in Tighe's handwriting and is marked interest.

Q. I call your attention to the last endorsement upon that exhibit, endorsement $180.00, February 6, 1889, and in that connection call your attention to a check which was marked Ex. 22 in a former action, and will ask you to state if that check does not correspond with the endorsement?

A. Yes, sir.

Q. By whom was that check signed?

A. The check was made out by me and signed P. B. McCarthy & Company by McCarthy.

Q. So that all of the endorsements, three of them on the back of Ex. 41 were paid by checks signed by P. B. McCarthy & Company and from funds carried in the First National Bank in the name of P. B. McCarthy & Company?

A. Yes, sir.

Q. Now, I notice on the back of Ex. 43, Mr. McCarthy, a number of endorsements marked Keenan, Wallace, and Keenan, Tracey & Seip, and Keenan; and I will ask you if those endorsements were

not made upon rent collected from Keenan for a portion of
484 the International Hotel upon an order given by you to the bank?

(The plaintiff objects as wholly immaterial; he gave an order to the bank and it would not change it any, and it is the same as paying his money, and that is upon Ex. 43 and ruled on before.
Objection sustained. Defendant excepts.)

Q. I will ask you, Mr. McCarthy, if all the endorsements upon the back of that note and the paper attached to it, Ex. 43, were not rent for a portion of the hotel, International Hotel, kept and occupied by Tracey & Seip, or Keenan, and collected by the bank under an order and applied upon this note when collected by the bank?

(Plaintiff makes the same objection as last above noted. Objection sustained. Defendant excepts.)

Q. Did you know when the account at the bank of P. B. McCarthy & Company was closed?

(The plaintiff objects to that as the books of the bank would be the best evidence as to that. Objection sustained. Defendant excepts.)

Q. So long as the P. B. McCarthy & Company account was carried in the bank, I will ask you if it is not true that all of the endorsements shown upon these exhibits are not now shown to have been made by checks signed by P. B. McCarthy & Company, and taken from the funds of that account?

(The plaintiff objected to this question as the checks are the best evidence as to what they show, and the account is not conclusive as to whose fund it was, and the plaintiff further objects that as to any payment made upon any notes upon which P. B. McCarthy & Company were not signers or endorsers, the account would be immaterial and not relevant.

485 Objection overruled to which ruling the plaintiff duly excepted.)

A. The checks will show for that; I could not tell because I had some moneys of my own, old accounts, that was paid to the bank also.

By Mr. WHITFIELD:

"The defendant offers in evidence as a part of the cross-examination of this witness the check Ex. A, dated December 23, the cancellation check stamp being December 23, 1890, signed by P. B. McCarthy & Company, for $150.00, signed, as the witness says, by Mr. McGuire, corresponding to the endorsement upon check Ex. No. 42 of that date."

(No objection to said offer, and a true copy of said check Ex. A, is hereto annexed as a part of this Statement of the Case.)

Q. Mr. McCarthy, I show you a check dated September 30th,

1890, marked Ex. B, for two hundred dollars with the endorsement on the back of Ex. 42 of the same date, and ask — to state if they do not correspond?

(The plaintiff objects to the question as cumulative, and makes the same objection heretofore made to a like question.
Objection overruled to which plaintiff duly excepted.)

A. It corresponds but the *o*ught is torn off of this note so that it only shows twenty instead of two hundred; the date corresponds.
Q. How is that check signed?
A. P. B. McCarthy & Company by McCarthy.

The defendant now offers to prove by this witness on cross-
486 examination that all of the endorsements upon the notes herein were made from funds and property of P. B. McCarthy & Company, a copartnership composed of the witness and plaintiff and Michael McGuire and Dennis J. Tighe, owners of the International Hotel, from their bank account and from their property.

(The plaintiff objects to the form of the offer as made to the notes herein which the firm of P. B. McCarthy & Company are not obligated.
Objection sustained as to the form of the offer, but you can prove it if you can.
Defendant excepts.)
The defendant now offers to prove on cross-examination of this witness that upon the notes, Ex. 43, Ex. 40, and Ex. 41, which were not the notes of P. B. McCarthy & Company but were signed by P. B. McCarthy and others, that all the endorsements are made by the funds and property of P. B. McCarthy & Company, or from its property.
(The plaintiff objects to the form of the offer.
Objection sustained.)
The defendant makes the same offer upon the note, Ex. 41, for four thousand dollars, bearing three endorsements.
(The plaintiff objects to the form of the offer.
Objection sustained. Defendant excepts.)

By Mr. WHITFIELD:

"The defendant now offers in evidence the check Ex. B, which is identified by the witness, corresponding to the interest payment upon Ex. 42 for $200.00."

(The plaintiff makes the same objection as heretofore made to like offers, and for the same reasons.
Objection overruled, to which ruling the plaintiff duly ex-
487 cepted.) (A copy of said Ex. B is hereto annexed as a part of this Statement of the Case.)

Q. Mr. McCarthy, you were a witness in the former trial of this case, were you not, and verified the pleadings on the part of the answering defendants?
A. Yes, I was a witness at the former trial.

Q. I show you page 22 of the bundle of papers, and ask you to state if that is your signature?
A. That is my signature.
Q. And you verified the pleading before A. Z. Wells November 21, 1900, as appears by that page?
A. Yes, sir.

By Mr. SCHRADER:

"The plaintiff moves to strike out the testimony of the witness as wholly immaterial and irrelevant."

(Motion overruled to which the plaintiff duly excepted.)

Q. Calling your attention, Mr. McCarthy, to Ex. 15 in this case, amended separate answer of P. B. McCarthy and Maggie McCarthy, I call your attention to page 42 of the bundle of papers I hold, and will ask you to state if that is your signature?
A. Yes, sir, that is.
Q. Now, let me see, Mr. McCarthy, you say you got four thousand dollars of the bank?
A. Yes, sir.
Q. August 22, 1887?
A. Yes, sir.
Q. And that loan ran from September 7, 1888, at 18 per cent?
A. Yes.
Q. And on that date a note was given for 12 per cent?
A. No, not 1888.

Q. Question withdrawn. As a part of the cross-examina-
488 tion I want to ask you if you are the same Patrick B. McCarthy who was plaintiff in this court in a case entitled Patrick B. McCarthy, plaintiff, versus Dennis J. Tighe; were you that same Patrick B. McCarthy that brought such action?
A. Yes, sir, what is that case?
Q. Foreclosure case?
A. Yes, sir.

Redirect examination:

On redirect examination the witness further testified as follows:
Besides the notes that have been introduced in evidence here and exhibits in this case, there were intervening notes, two of them, one dated on or about January 24, 1888, and one dated on or about April 24, 1888, each for four thousand dollars, and drawing eighteen per cent interest per annum; and they have been either lost or mislaid. Before the trial of this action I made a search for them among my papers and caused a search to be made in the records transmitted back from the supreme court and I failed to find them. They are a part of the notes and identical notes referred to by the supreme court in its decision already mentioned. The co-partnership of P. B. McCarthy & Company was composed of P. B. McCarthy, M. McGuire and D. J. Tighe. There was no security given for the personal property that was sold to McGuire and Tighe, with the exception of two notes; two notes were given for the personal property,

one given by Tighe for $1,333.33 1/3, and the other by McGuire for the same amount. The firm and co-partnership ran three years if I remember right. I had been in the hotel business before the organization of the firm and since 1881, and the date of that co-partnership was in January, 1888. I will state, if the court will allow me, that I have been in business in Rapid City since
489 the 9th day of August, 1878; I think that is the date I commenced business in Rapid City, and I have been in business ever since; I have done a good deal of business and a good deal of credit and those checks and moneys that have been presented was a part of the moneys of old accounts I had collected in during the co-partnership of the prior years and turned it into my indebtedness to the bank.

Q. Mr. McCarthy, I will ask you to state to the Court and jury what arrangement there was made—oral arrangement or agreement—between Mr. Tighe and McGuire and yourself with reference to the payment of money upon this indebtedness to the bank, this four thousand dollar indebtedness to the bank?

A. Why, there was an oral agreement between us; I was indebted to the bank and I was hard up and Mr. Halley was crowding me for money continually, and that if they would go security on my note then Mr. Halley would give us credit, and I sold them an interest in the hotel and the moneys that were to come in from all sources were to be paid on my indebtedness until it was paid, other than expenses.

Q. Now, Mr. McCarthy you may state to the court and jury what you were to receive from McGuire and Tighe for your sale of an interest to each of these parties in the International Hotel and furniture and fixtures?

A. I was to receive the money after this indebtedness was paid to the bank; I was to receive according to their notes.

Q. Now, what was the agreed amount between you as to the price that they was to pay for the hotel, for instance, as a separate item, and for the fixtures and furniture as a separate item?

490 A. The hotel property was put in at $12,000 and the furniture and fixtures for four thousand.

Q. How much interest were they to have?

A. One third interest each.

Q. Now, then, how did they pay you for a third interest in the hotel?

A. They didn't pay me.

Q. What did they promise to pay?

A. Notes as I said.

Q. Given for how much?

A. For $4,000.00 each of the property.

Q. On the real property?

A. Yes, sir.

Q. What did they give you to represent a third interest to each of them in the furniture and fixtures?

A. A note for $1,333.33⅓ each.

Q. Now, the notes of $4,000 each they gave you for the payment

of their one-third interest in the hotel was secured by a mortgage on the hotel?

A. Yes, sir.

Q. And the notes which represented their interest in the hotel furniture and fixtures for the $1,333.33⅓ each, there was no security for that.

A. No mortgage for that.

Q. Where are these two notes for $1,333.33⅓ now, if you know?

A. I think the First National Bank has got them.

(The plaintiff now makes demand upon the defendant for these notes, and defendant's counsel states that it has not got them and never had them.)

A. Continued: They got all the notes.

Q. Then in other words, all that Tighe and McGuire did was simply to go on this four thousand dollar note of yours for
491 which you gave them a third interest in the hotel property and fixtures, and if they gave you any other consideration, tell the court and jury what it was.

A. Nothing but to endorse those notes at the bank and go on as security.

Q. Now, then, I will ask you if from 1879 to 1888 when this co-partnership was formed, whether or not you had done any credit business here in Rapid City?

A. Yes, sir.

Q. Now, then, state to the court and jury if you collected in any of these outstanding debts, old accounts, after the co-partnership was formed, that had been due to you prior to the formation of the co-partnership?

A. Yes, sir.

Q. What did you do with the money you received from the collection of these outstanding debts?

A. I turned it into the bank in connection with the Company money to pay this indebtedness.

Q. Deposited it in the P. B. McCarthy & Company fund and money in the First National Bank?

A. Yes, sir.

Q. Now, Mr. McCarthy, please state to the court and jury what implied understanding or agreement there was between you and McGuire and Tighe with reference to when checks were given of the firm of P. B. McCarthy & Company to apply on this four thousand dollar indebtedness, state to the court and jury what arrangement was made between you as to what credit should be given to them, if any?

A. They were to get credit for one-third of the Company money paid on this indebtedness on their private notes.

492 Recross-examination:

Q. Did you keep a book account of these collections?

A. Some of them.

Q. And also of Tighe and McGuire?

A. I put them in slips in the drawer. Yes, sir, they were to get credit for one third of all payments made out of the receipts of P. B. McCarthy & Company.

Redirect examination:

Q. Did they get credit for the payments made?

A. Yes, sir.

Q. State when the partnership ceased to exist as a partnership as near as you can remember it now?

A. Some of the parties dropped out before the term expired, Mr. Tighe for instance, he left and went to Wyoming I guess; I think it was in 1889 if I remember right.

Q. It was to have expired December, 1890?

A. Yes, sir.

Q. Now, Mr. McCarthy, then each and all of the payments that appear to have been made by the checks of P. B. McCarthy & Company were moneys that were actually charged to your individual account and for which the other two partners in the concern had received and were given credit at the time; is that correct?

(The defendant objects to the question as leading and suggestive and selfserving, also as incompetent, irrelevant and immaterial, and not the best evidence, not binding at all upon the defendant, and for all of the reasons urged to this class of testimony in former objections. Objection overruled. Defendant excepts.)

493 Q. Mr. McCarthy, I call your attention again to Exs. Nos. 41 and 42 introduced in evidence; I notice that upon Ex. 41 the name of D. J. Tighe appears and upon the Ex. 42 it does not appear; explain to the court and jury how that came about?

A. This note of August 7, 1888, signed by Tighe and the note of May 2, 1889, is not signed by Tighe; it is only signed by McGuire.

Q. Why was not Tighe on that note?

A. The business was not paying and Tighe quit; the business was not paying; I think it was about the time that prohibition set in or was going to set in and the receipts would not pay the expenses and Tighe quit and left.

Q. State whether or no he refused to go on any other paper?

A. He did.

Q. State whether or no in that connection he refused to go on any further with the business of P. B. McCarthy & Company?

A. Yes, sir, he refused.

Q. State whether or no the fact he refused to go on the papers was made known to the officers of the First National Bank at that time, and they took the note of May 22, 1889, as a renewal of the previous paper?

A. Yes, sir.

Q. With his name out of it.

A. Yes, sir.

Q. Now I call your attention to Ex. 42 and Ex. 43, and I notice that upon the paper Ex. 42 the name of M. McGuire on this as an individual?

A. Yes, sir.

Q. And it does not appear upon the paper, note, Ex. 43, which appears to be a renewal of Ex. 42; state why McGuire's name
494 does not appear upon the last paper?

A. He quit also.

Q. How soon after Tighe quit?

A. I could not tell; it was shortly afterwards; when prohibition set in he quit.

Q. State whether he refused to go on any other paper at the bank?

A. Yes, sir, and then my wife had to go on with me.

Q. State if his refusal to give any further note paper was made known to the bank?

A. Yes, sir.

Q. And state whether or not the bank took the paper Ex. 43, as a renewal of Ex. 42?

A. Yes, sir.

Q. Minus his name?

A. Yes, sir.

Q. And then they insisted upon a mortgage to secure the paper?

A. Yes, sir.

Q. And the mortgage, Ex. 44, was given at that time?

A. Yes, sir.

Q. How soon, Mr. McCarthy, after Tighe dropped out did McGuire drop out and quit the business?

A. Shortly afterwards.

Q. About how long as near as you can remember; sometime during the summer of that self same year?

A. I think it was during the fall of the year.

Q. The year 1889?

A. Yes, as near as I can remember.

Q. Now, then, Mr. McCarthy, I understood you to say that Tighe dropped out and McGuire too, for the reason that the business did not pay?

A. Yes, sir.

495 Q. Who done the business after that?

A. I did.

Q. And continued down to the present time?

A. Ever since except I rented the building in 1892 and gave an order to the bank to collect the rents.

Q. To apply on this indebtedness?

A. Yes, sir, those are the items endorsed upon the back of the notes.

Q. You rented it yourself personally?

A. Yes, sir.

Q. Now, for the purpose of refreshing your recollection, I will ask you to look again at this paper, Ex. A, and state if that is the McGuire check?

A. Yes, sir.

Q. $150.00, McGuire signed the firm name?

A. Yes.

Q. And was given when?

A. December 23, 1890.

Q. Now, I will ask you if that was about the time he dropped out of the concern?

A. Yes, sir, between that and the 1st of January.

Recross-examination:

Q. When you formed the co-partnership with Tighe and McGuire you put in the Hotel and bar fixtures and business?

A. Yes, sir.

Q. At how much?

A. $16,000.00.

Q. And you sold each of them a third interest?

A. Yes, sir.

Q. They gave you what as evidence of their indebtedness to you?

496 A. They gave me two notes of $1,000.00 each for a third interest each in the property and a note of $1,333.33⅓ each for a third interest each in the furniture and fixtures.

Q. Did you give them a bill of sale to the personal property?

A. I think I did.

Q. Are you sure of that?

A. I am not sure; it is so long ago, but I think I did, and it was so specified I think.

Q. Now, where did you put those four notes?

A. The First National Bank demanded them and got them.

Q. You afterwards brought two actions against McGuire and against Tighe did you not?

A. Yes, sir.

Q. To foreclose their interest in the property?

A. Yes, sir.

Q. Did you have their notes at that time?

A. We got them out of the bank.

Q. Mr. McGuire surrendered at that time further interest in the concern?

A. Yes, sir.

Q. And their interest in the personal property had been wiped out?

A. Partly.

Q. Didn't you get the other notes back from the bank at that time?

A. No, sir.

Q. Did you ever see the notes after they were first made?

A. No, I think the bank demanded all the notes and got them, and when we started the foreclosure we only demanded the notes for the real estate.

Q. Don't you remember in a former action Mr. McGuire testified for you?

497 A. He was on the witness stand.

Q. Don't you remember on the stand it was stated that their going on your four thousand dollar notes at the bank was that they assumed one-third of that four thousand dollar indebtedness

each and gave their notes for four thousand dollars each secured by a real estate mortgage?

(The plaintiff objects to that question. If McCarthy so testified the record is the best evidence.

Objection sustained. Defendant excepts.)

CHARLES CANFIELD sworn as a witness on the part of the plaintiff and examined by Mr. Schrader, testified as follows:

Referring to the paper marked for identification Ex. 47 and Ex. 47-*a*, that is my signature to Ex. 47; I first saw that paper on the 25th day of January; that was before the commencement of this action.

(Said papers Ex. 47-*a* being a demand of date January 25, 1905, and Ex. 47, being the sheriff's return of service thereof, were then offered by the plaintiff and were received in evidence and read to the court and jury and true copies thereof are hereto annexed and made a part of this Statement of the Case.)

(The defendant then moved the court to strike out that portion to Ex. 47-*a* which refers to the payment of said judgment, and that it be stricken out and stricken from the record.

(Said motion was granted by the court as to that portion of Ex. 47-*a*, to which ruling the plaintiff at the time duly excepted.)

(It was then admitted in open court that the defendant
498 refused to comply with the demand made before the commencement of this action for the payment of the penalty asked for in the complaint and that the payment was refused.)

PATRICK B. MCCARTHY, recalled as a witness on his own behalf and examined by Mr. Schrader, further testified as follows:

That is my signature to the paper or check marked for identification Ex. 48; and the signature and the handwriting endorsed upon the back thereof are the signature and handwriting of Jacob S. Gantz, clerk of courts.

(Plaintiff then offered in evidence said Ex. 48, together with the endorsements thereon, a true copy of which is hereto annexed and made a part of this Statement of the Case.)

By Mr. WHITFIELD: "The defendant objects to the offer as a self serving declaration, and incompetent, irrelevant and immaterial to prove or disprove any of the issues in this case, it being a check, as the court will see, endeavoring to prove a payment which is not pleaded."

(Objection sustained to which the plaintiff duly excepted.)

Q. I will ask you, Mr. McCarthy, if the interest note of July 22, 1891, for $350.00, payable to the First National Bank of Rapid City, on August 31, 1891, note charged with interest at the rate of 12 per cent per annum from date until paid, for value received, has been paid?

A. Yes, sir.

Q. Before the commencement of this action?
A. Yes, sir.
Q. By whom?
A. By me.

Thereupon the plaintiff rested.

499 (It was then admitted in open court that the present action was commenced by the service of the summons and complaint upon the defendant at Rapid City, South Dakota, on the 25th day of January, 1905.)

Thereupon the defendant rested and both sides rested and the testimony closed.

At the proper time the plaintiff asked the court to give each of the following instructions to the jury:

"In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. MCCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 1 Requested by Plaintiff.

"The court instructs the jury that this action is based upon Section 5198 of the Revised Statutes of the United States, relating to national banks, and that the Statute of Limitations governing this action is the one provided for by said Section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you that the final judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said Section 5198 of the Revised Statutes of the United States, did not accrue and therefore, the Statute of Limitations therein provided did not commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by the Statute of Limitations, and your verdict so far as the said
500 limitation of two years is concerned will be in favor of the plaintiff and against the defendant.

Refused.

LEVI MCGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI MCGEE, *Judge.*

"In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 2 Requested by Plaintiff.

"You are further instructed that the evidence is undisputed that the loan between the plaintiff and bank referred to in the complaint was usurious and that the interest payments made upon the notes signed by P. B. McCarthy and Maggie McCarthy, dated July 22, 1891, and February 17, 1896, and marked Exhibits 43, 45 and 46 were made by the plaintiff himself, and upon his own behalf, and as to all such payments of usurious interest your verdict will be for the plaintiff if you further find that the defendant through its managing officers knowingly accepted, received and retained the same.

Refused.

LEVI McGEE, *Judge*.

501 "To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge*.

"In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 3 Requested by Plaintiff.

"You are further instructed that all payments made by the checks of P. B. McCarthy & Company, and endorsed upon the notes referred to in the complaint as interest received thereon should be credited and found by you as individual payments of the plaintiff, Patrick B. McCarthy, provided you believe from the evidence that the members of said firm so agreed that such payments should be made as the individual payments of the plaintiff, and so applied. And if you find from the evidence that the partners did so agree that said payments should be so made and applied as the individual payments of the plaintiff and should be considered as such, then you will find for the plaintiff as to all payments which you may find

from the evidence were made by the checks of the firm of P. B. McCarthy & Company.

Refused.

LEVI McGEE, *Judge.*"

"To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*

502 Which the court refused as to each instruction to which the plaintiff at the proper time excepted.

At the proper time the defendant made the following motion to the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues:

"Both sides having rested, the defendant at this time moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the following reasons, viz:

"First. The undisputed evidence in this case shows that the alleged payments of usurious interest were made on or prior to the 10th day of January, 1897, and this action was not commenced until the 25th day of January, 1905, and hence, the said cause or causes of action in the complaint mentioned are barred by the statute of limitations under Section 5198 of the Revised Statutes of the United States, and acts amendatory thereof.

"Second. It appears by the undisputed evidence that the alleged payments of usurious interest in the complaint set forth, and constituting plaintiff's cause or causes of action, were all made on or prior to the 1st day of January, 1897, and this action was not commenced until the 25th day of January, 1905, or more than eight years thereafter, and, hence, was not commenced within two years from the time the usurious transactions occurred, and, hence, barred by the Statute of Limitations under Section 5198 of the Revised Statutes of the United States and acts amendatory thereof.

"Third. The undisputed evidence shows that the payments or usurious transactions in the complaint mentioned, which are the basis of the plaintiff's cause or causes of action, were not
503 made, nor did they occur within two years before the commencement of this action, and, hence, are barred by the Statute of Limitations under Section 5198 of the Revised Statutes of the United States and act amendatory thereof.

"Fourth. The undisputed evidence shows that the cause or causes of action set forth in the complaint did not accrue within two years before the commencement of this action, and said cause or causes of action, and each thereof, are barred by Section 5198 of the Revised Statutes of the United States and the acts amendatory thereof."

And the Court thereupon granted the said motion and directed the jury to return into court a verdict in favor of the defendant and against the plaintiff upon all the issues; which said verdict, so re-

turned by the jury pursuant to the instruction and direction of the court, as aforesaid, is in words and figures as follows, to-wit:

"In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Verdict.

"We, the jury duly and legally empaneled and sworn in the above entitled action, to try the issues in said cause, find for the defendant and against the plaintiff upon all the issues.
M'ch 31st, 1905.
JOHN E. MURPHY, *Foreman.*"

504 The following are the endorsements on back of said verdict:
"In the Circuit Court of South Dakota in and for Pennington County, in the 7th Judicial Circuit. Patrick B. McCarthy vs. First National Bank of Rapid City, So. Dak. Verdict. Filed in the Circuit Court Mar. 31, 1905, at 2 o'clock P. M. J. S. Gantz, Clerk."

To which verdict the plaintiff at the time duly excepted.
And thereupon and before the entry of judgment herein *and* plaintiff took and filed exceptions to said charge and direction, as follows, to-wit:

"Exceptions to Charge of Court.

"Comes now the above named plaintiff after the Court's instructions to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and before the entry of judgment herein, and excepts to the court's instruction to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the reasons and upon the grounds following, to-wit:

I.

505 "It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action and is not barred by Section 5198 of the Revised Statutes of the United States or by any other statute of limitation.

II.

"It appears by the undisputed evidence that the plaintiff's cause of action accrued within two years next before the commencement of

this action, and that the same is not barred by the provisions of Section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

III.

"There is not evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action or that the same is barred by Section 5198 of the Revised Statutes of the United States.

IV.

"There is no evidence to support the said direction of the Court to the jury to return a verdict herein in favor of the defendant and against the plaintiff upon all the issues and the said direction and instruction of the court is contrary to the evidence, and contrary to law and contrary to the provisions of said Section 5198 of the Revised Statutes of the United States.

V.

"It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and against the plaintiff on the 12th day of January, 1905, and not before; and that the total payments at any time made
506 by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in August, 1887; and that the plaintiff's cause of action to recover a penalty under the provisions of said Section 5198 of the Revised Statutes of the United States did not accrue until the said 12th day of January, 1905, and was therefore not barred by the provisions of said Section 5198.

VI.

"It clearly appears from the evidence that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the evidence clearly shows that the plaintiff paid to the defendant, and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged and the verdict should have been for the plaintiff and against the defendant for the amount claimed in the complaint.

VII.

"For all the reasons above stated, the court erred not only in giving such instructions, but in withdrawing the case from the jury and ordering a verdict for the defendant herein, and the said charge

and ruling of the court is contrary to the evidence and contrary to law, and is not sustained by the evidence.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Plaintiff's Attorneys.

"Which foregoing exceptions of the plaintiff to the Court's
507 said ruling and instruction were duly made at the time of the giving of such instruction and are by the Court hereby allowed and ordered to be made a part of the record of this case and filed herein, this 31st day of March, A. D. 1905.

By the Court:

LEVI McGEE, *Judge.*

Attest:

J. S. GANTZ, *Clerk.*"

[Seal of Circuit Court.]

And thereafter on the 28th day of June, A. D. 1905, judgment finally dismissing said action upon its merits, and that the defendant recover of the plaintiff the costs and disbursements of this action, was filed and entered in accordance with said verdict; to which said judgment the plaintiff at the time duly excepted.

Thereafter on the 19th day of April, 1905, and within the time allowed by law, the plaintiff duly served upon defendant's attorneys the following notice of its intention to move for a new trial:

"*Notice of Intention to Move for a New Trial.*

"Take notice, that the plaintiff, Patrick B. McCarthy, intends to move the court to vacate and set aside the verdict herein and the judgment entered thereon, and to grant a new trial of this action, upon the following grounds and for the following causes, materially affecting the substantial rights of the plaintiff, to-wit:

I.

"Irregularity in the proceedings of the court, by which this plaintiff was prevented from having a fair trial.

508 II.

"Insufficiency of the evidence to justify said verdict, or judgment, and that said verdict and judgment and each of them are against law.

III.

"Error in law, occurring at the trial and excepted to by this plaintiff.

"Said motion will be made upon affidavits and a statement of the case, to be hereinafter served and filed, and upon the judgment roll herein.

Dated at Rapid City, South Dakota, this 19th day of April, A. D. 1905.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Attorneys for Plaintiff.

To Messrs. Buell & Gardner, and Fred H. Whitfield, Esquire, Attorneys for Defendant."

Date of filing of above notice April 19, 1905, at 10 o'clock, a. m., by J. S. Gantz, clerk.

Thereafter by the stipulation of the parties and by order of the Court, for good cause shown and in furtherance of justice, the plaintiff's time in which to prepare and serve his proposed statement of the case was duly extended until the 14th day of August, A. D. 1905, and that time was by consent of the parties and by order of Court duly fixed within which said acts might be done.

The foregoing is and constitutes all the testimony and evidence introduced or offered upon the trial of said action.

Specification of Errors.

509 And the plaintiff here and now, as a part of this Statement of the Case, specifies the following particulars in which the evidence is alleged by the plaintiff to be insufficient to justify the verdict of the jury and the decision and judgment of the Court, and the following particular errors of law occurring at the trial and excepted to by the plaintiff, upon which the plaintiff will rely upon his motion for a new trial herein, or upon any appeal which may be taken by him in this action, to-wit:

I.

The evidence is insufficient to justify the verdict of the jury and the judgment entered thereon, and said verdict and judgment and each of them are against law, in the following particulars:

1. It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action, and that the same is not barred by the provisions of Section 5198 of the Revised Statutes of the United States, or by any other statute of limitations.

2. There is no evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action, or that the same is barred by Section 5198 of the Revised Statutes of the United States, or by any other statute of limitations.

3. There is no evidence to support the said direction of the Court to the jury to return a verdict herein in favor of the defendant, and against the plaintiff upon all the issues, and the said direction and instruction of the Court is contrary to the evidence and is contrary

to law, and contrary to the provisions of said Section 5198
510 of the Revised Statutes of the United States.

4. It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and against the plaintiff on the 21st day of January, 1905, and not before; that the total payments at any time made by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint, did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in August, 1887; that the plaintiff's cause of action to recover the penalty under the provisions of said Section 5198 of the Revised Statutes of the United States did not accrue until the 12th day of January, 1905, and was therefore not barred by the said provisions of the said Section 5198, this action having been duly commenced on the 25th day of January, A. D. 1905.

5. It clearly appears from the evidence, that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the plaintiff paid to the defendant and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged, and the verdict should have been for the plaintiff and against the defendant for the amount claimed in the complaint.

6. For all of the reasons hereinbefore specified the court
511 erred in withdrawing the case from the jury and ordering and directing a verdict in favor of the defendant and against the plaintiff upon all the issues, and the said charge and ruling of the court is contrary to the evidence and is contrary to law and is not sustained by the evidence herein, and the evidence herein was and is insufficient to justify the said direction of a verdict.

II.

The Court erred in making and entering its order of date February 17, 1905, striking out the sixth paragraph of the complaint herein as irrelevant and redundant, for the reasons, that the allegations of said sixth paragraph of the complaint are material to this controversy, and are properly a part of the issues in this action, and that the plaintiff was entitled to allege and prove as a part of his case the payment and satisfaction of the judgment in said sixth paragraph referred to as well as the date and amount thereof, and said allegations are competent and relevant and material to the issues in this action; that the allegations of said sixth paragraph are necessary for the full and complete presentation and maintenance of plaintiff's case and the evidence in support thereof; that this action is brought to recover a statutory penalty under Sections 5197 and 5198 of the Revised Statutes of the United States; that the final judgment in the action mentioned and referred to in the fifth paragraph of the complaint was filed and entered on the 12th day

of January, 1905, and not before; that the total payments of both principal and interest on the original loan mentioned in said fifth paragraph of the complaint, did not equal the sum of four thousand dollars, the amount of said original loan; that it is necessary for the plaintiff to show the entry of final judgment upon the said indebtedness and the payment and satisfaction thereof as a condition
512 precedent to the commencement and maintenance of this action; that Section 5198 of the Revised Statutes of the United States prescribes the penalty sued for in this action and controls all questions in regard to the recovery thereof; that the ruling of the court in striking out said sixth paragraph of the complaint is contrary to the laws of this state, and to the Statutes of the United States, and particularly to said Section 5198; that for the reasons aforesaid the plaintiff was entitled to allege and prove as a part of his main case, the full payment and satisfaction of the said judgment; that the plaintiff was not entitled to maintain this action without alleging and showing the payment of a sum equal at least to the principal of the loan originally made to him by the defendant, and that plaintiff's cause of action for the recovery of a penalty under said Section 5198 would not be complete and could not accrue without an allegation and proof that the plaintiff had before this action paid to the defendant an amount exceeding said original loan.

III.

For all the reasons hereinbefore specified the Court erred in sustaining the objections of the defendant to the following question propounded to the witness Jacob S. Gantz upon his direct examination, to-wit:

"Q. You may state to the court and jury the record you have there with reference to this judgment, judgment found on page 185 of Judgment Book of Circuit Court, Pennington county, South Dakota, Book 4?"

And in sustaining the motion of the defendant to strike out the following answer thereto, to-wit:

"A. Patrick B. McCarthy, et al., judgment debtor, First National Bank of Rapid City, South Dakota, judgment creditor;
513 amount of judgment, damages and costs, $5,951.56; date of judgment, January 12, 1905; when filed, January 12, 1905, nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; Judgment Book No. 11, page 350; Name of Court, *Cirfield;* Satisfaction of Judgment Record No. 2, page 11; Fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of court."

For all of the reasons hereinbefore specified and for the further reasons that whether or not it was necessary for the plaintiff to allege in his complaint the payment and satisfaction of said judgment, it was necessary and proper for him to prove said payment and satisfaction; that as appears by the undisputed evidence herein, the amount of the loan originally made by the defendant to the plaintiff was four thousand dollars and no more; that the total payments of both principal and interest made by the plaintiff to the defendant before the date of said judgment

were less than the amount of said original loan and that no cause of action to recover a penalty under Section 5198 of the Revised Statutes of the United States would be complete or could accrue without proof that the plaintiff had before the commencement thereof paid to the defendant an amount exceeding the amount of said original loan. The said objections made by the defendant to said question are as follows:

"The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court and objects to the payment or the satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out.

"The defendant objects for the reasons that the entry
514 is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings."

Which question, answer, objections, motion, ruling and exceptions appear on pages 3 and 4 of this Statement of the Case.

IV.

For all of the reasons hereinbefore specified and assigned the Court erred in sustaining the objections of the defendant to the following question propounded to the witness Gantz upon his direct examination, to-wit:

"Q. As clerk of courts, I will ask you if on the 21st day of January, 1905, you were not paid as clerk of this court $5,961.91 in satisfaction of this judgment, in full of the judgment, interest and costs to that date?"

Said objections being as follows:

"The defendant objects as calling for a conclusion of the witness, impertinent, and for all of the reasons offered to the same evidence,—counsel knowing from the ruling of the Court that it is inadmissible."

Which question, objections, ruling and exception appear on pages 4 and 5 of this Statement of the Case.

V.

For all of the reasons hereinbefore specified and assigned, the Court erred in sustaining the objections of the defendant to
515 the following question propounded to the witness Gantz upon his direct examination, to-wit:

"Q. Mr. Gantz, I notice that in Judgment Docket four of Pennington county on page 185 and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head 'satisfaction, remarks, etc.' page 185, you have just entered 'fully satisfied January 21, 1905, by payment of $5,961.91,

J. S. Gantz, clerk of court;' I will ask you whether or not you paid that money to the plaintiff?"

To which question the defendant objected as cumulative and calling for a conclusion of the witness, and as assuming a fact not in evidence, and as incompetent, irrelevant and immaterial for all of the reasons stated in the former objection to the offer of proof relative to the payment of this or any other judgment.

Which question, objection, ruling and exception appear on page 6 of this Statement of the Case.

VI.

For all of the reasons hereinbefore specified and assigned, the Court erred in sustaining the objections of the defendant to plaintiff's offer in evidence of all of that part of page 185 of Judgment Docket No. 4 of said circuit court relating to said judgment of the First National Bank of Rapid City, South Dakota, v. Patrick B. McCarthy, et al, as it there appears of record,—said objections to said record and judgment docket being made upon the ground that the same is cumulative and for all of the reasons above noted to that class of testimony; and which offer, objections, ruling and
516 and exception appear on pages 6 and 7 of this Statement of the Case.

VII.

For all the reasons hereinbefore specified and assigned the Court erred in sustaining the motion of the defendant to strike out that portion of the demand, Ex. 47 *a*, which refers to the payment of the said judgment obtained by the defendant against the plaintiff; for which motion no grounds or reason was assigned, and which motion, ruling and exception appear on page 26 of this Statement of the Case.

VIII.

For all of the reasons hereinbefore specified and assigned, the Court erred in sustaining the objections of the defendant to the plaintiff's offer in evidence of Ex. 48, being a certified check for $5,961.91, made and delivered by the plaintiff to Jacob S. Gantz, clerk of courts, January 21, 1905, in full payment and satisfaction of said judgment;—the defendant objecting to said offer as a self-serving declaration and incompetent, immaterial and irrelevant to prove or disprove any of the issues in this case, it being a check, endeavoring to prove a payment which is not pleaded.

Which offer, objections, ruling and exceptions appear on pages 26 and 27 of this Statement of the Case.

IX.

For all of the reasons hereinbefore specified and assigned the Court erred in refusing to give to the jury instruction No. 1 requested by the plaintiff,—which instruction, refusal and exception appear on pages 27 and 28 of this Statement of the Case.

517 X.

For all of the reasons hereinbefore specified and assigned the Court erred in refusing to give to the jury instruction No. 2 requested by the plaintiff,—which instruction, refusal and exception appear on pages 28 and 29 of this Statement of the Case.

XI.

For all of the reasons hereinbefore specified and assigned the Court erred in refusing to give to the jury instruction No. 3 requested by the plaintiff,—which instruction, refusal and exception appear on page 29 of this Statement of the case.

XII.

For all of the reasons hereinbefore specified and assigned the Court erred in sustaining the motion of the defendant to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and in instructing and directing the jury to return such verdict, and in withdrawing said case from the jury and ordering a verdict for the defendant herein, and said charge and ruling of the Court is contrary to the evidence and contrary to law and is not sustained by the evidence for all of the reasons hereinbefore specified;—which motion, direction, instruction and exception appear on pages 29, 30 and 31 of this Statement of the Case.

XIII.

For all of the reasons hereinbefore specified and assigned the verdict of the jury and the judgment of the Court are erroneous and contrary to law and contrary to the evidence and are not sustained by the evidence.

518 Wherefore for the reasons and errors aforesaid the plaintiff prays the Court to vacate and set aside the verdict of the jury and the judgment of the Court, and to grant a new trial of this action.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Attorneys for Plaintiff.

Rapid City, S. D., Aug. 10, 1905.

Exhibit 1.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff,

versus

Patrick B. McCarthy, Maggie McCarthy, Milton Frease, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased, Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Summons.

The State of South Dakota Sends Greeting to the above named defendants:

You and each of you are hereby summoned and required to answer the complaint of the above named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscribers at their office in the City of Rapid City, in Pennington county, and State of South Dakota within thirty days after the service of this summons upon you, exclusive of the date of such service; and if you fail to answer said complaint within that time said plaintiff will apply to the above named court for
519 the relief prayed for in its complaint in this action, and for the costs thereof.

Dated at Rapid City, So. Dak., this January 26, A. D. 1897.

FOWLER & WHITFIELD,
Attorneys for the Plaintiff.

EXHIBIT 2.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Favel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Notice of no Personal Claim.

To the defendants Milton Frease, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson, Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen and Brothers; Edward W. Speed, as Administrator of the estate of William B. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John J. Favel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of South Dakota, above named:

520 Please take notice, that this action is brought for the purpose of foreclosing a certain mortgage executed by the defendants Patrick B. McCarthy and Maggie McCarthy to the plaintiff herein upon lots numbered fifteen and sixteen in block numbered eighty-five in the Original Townsite of Rapid City, in Pennington County, South Dakota, bearing date July 22, 1891 recorded in the office of the Register of Deeds in and for Pennington County, South Dakota, in Book "17" of Mortgages at page 14 thereof; and no personal claim is made against you or any of the defendants above named except the said defendants Patrick B. McCarthy and Maggie McCarthy; and you are made a party defendant herein for the reason that you have or appear of record to have some interest in or lien upon said mortgaged premises, but which said interest or lien, if any, is junior and inferior to the mortgage lien of this plaintiff above mentioned.

Dated January 26, A. D. 1897.

FOWLER & WHITFIELD,
Attorneys for the Plaintiff.

EXHIBIT 3.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, South Dakota, a Corporation, Plaintiff,

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee, Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased, Thomas C. Blair, Albert Amsbury, John J. Favel, Omaha National Bank, a Corporation; and Pennington County a Public Corporation of the State of South Dakota, Defendants.

Complaint.

521 The plaintiff complains of the defendants above named and for cause of action says:

First.

That the plaintiff, the First National Bank of Rapid City, South Dakota, is a banking corporation, organized and existing under the laws of the United States, and having its principal place of business at Rapid City, State of South Dakota.

Second.

That on the 22 day of July 1891, at Rapid City, South Dakota, the defendants Patrick B. McCarthy, in and by the name of P. B. McCarthy, and Maggie McCarthy, for value received, duly made, executed and delivered to the plaintiff, their certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, in six months after said date, the sum of five thousand dollars, with interest thereon at the rate of twelve per cent per annum from date until paid.

Third.

That to secure the payment of the principal sum and interest mentioned in said promissory note, said defendants Patrick B. McCarthy, in and by the name P. B. McCarthy, and Maggie McCarthy, did, at the same time execute under their hands, duly acknowledge and deliver to the said plaintiff, their certain mortgage, bearing even date with said promissory note, the acknowledgment of the said execution of which said mortgage bears date the 24th day of July, 1891, whereby said defendants Patrick B. McCarthy and Maggie

McCarthy, mortgaged to the said plaintiff, the First National Bank of Rapid City, South Dakota, a corporation, in fee, certain lands and real estate situated in the County of Pennington and State of South Dakota, and described in said mortgage as follows: viz: Lots numbered fifteen (15) and sixteen (16) in Block numbered eighty-five (85) of the Original Townsite of Rapid City, Pennington County, South Dakota, as shown on the official plat of said Rapid City, South Dakota, on file in the office of the Register of Deeds of Pennington County, South Dakota. Which said mortgage
522 contained a condition for the payment of said sum of five thousand dollars with interest at the rate, and at the time and in the manner specified in said note, and according to the conditions of said note, to-wit: interest and principal being due and payable six months after the date of said note.

Fourth.

That said defendants Patrick B. McCarthy and Maggie McCarthy covenanted and agreed in said mortgage that in case of the foreclosure or commencement of foreclosure thereof they would pay statutory attorney's fees in addition to the taxable costs of said foreclosure suit.

Fifth.

That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards duly recorded in the office of the register of deeds in and for the county of Pennington and state of South Dakota, on the 10th day of October, 1891, at 3:30 o'clock p. m. in Book "17" of Mortgages on page "14" of the records of said County of Pennington.

Sixth.

That the said defendants Patrick B. McCarthy and Maggie McCarthy have failed to comply with the terms of said promissory note and mortgage, by failing and omitting to pay said principal sum of five thousand dollars mentioned in said note, which became due and payable January 22, 1892 or any part thereof. And plaintiff alleges the fact to be that said promissory note has not been paid, nor has any part thereof been paid, except that between the 7th day of February, 1892, and the 17th day of February, 1896, interest payments were paid thereon amounting in the aggregate to the sum of two thousand sixty-seven and 74-100 ($2,067.74) dollars, leaving still due and unpaid on account of said promissory note on said February 17, 1896, the sum of five thousand six hundred seventy-five dollars and fifty cents ($5,675.50).

Seventh.

523 That on the 17th day of February, 1896, said plaintiff and said defendants Patrick B. McCarthy and Maggie McCarthy had a statement or accounting of the amount due on account of said promissory note and said mortgage, at which time there was found

to be due thereon to the plaintiff from said defendants the sum of five thousand six hundred seventy-five and 50-100 ($5,675.50) dollars; and at which time said defendants Patrick B. McCarthy and Maggie McCarthy, the latter in and by the name of Mrs. Maggie McCarthy as renewal of said first promissory note above mentioned, duly made, executed and delivered to the plaintiff their two certain promissory notes in writing, dated on that day, one of said notes being for the sum of five thousand dollars, due and payable in four months after date, with interest thereon at the rate of twelve per cent per annum from date until paid; and the other of said last two promissory notes being for the sum of six hundred seventy-five and 50-100 ($675.50) dollars,—and being due and payable in thirty days after said date with interest thereon at the rate of twelve per cent per annum from date until paid; and the other of said last two promissory notes being for the sum of six hundred seventy-five and 50-100 ($675.50) dollars, and being due and payable in thirty days after said date with interest thereon at the rate of twelve per cent per annum from date until paid. Said two promissory notes not being as an original loan, but being given as renewal of the said note of five thousand dollars hereinbefore mentioned. That said sum of five thousand six hundred seventy-five and 50-100 ($675.50) dollars has not been paid, nor has any part thereof been paid, except the sum of thirty dollars paid on account of interest thereon on July 1, 1896, and the sum of fifty dollars paid on account of interest thereon November 23, 1896, and the plaintiff is still the owner and holder of said two notes last mentioned and said mortgage, and there is now justly due and owing to the plaintiff, from said defendants Patrick B. McCarthy and Maggie McCarthy on said notes and said mortgage said sum of five thousand six hundred seventy-five dollars fifty cents, together with interest thereon at the rate of
521 twelve per cent per annum from the first day of April, 1896, besides the additional sum of twenty-five dollars, the statutory attorney's fees in this action.

Eighth.

And the plaintiff further states that no action or proceedings at law or otherwise have been had to recover the sum so secured by said notes and mortgage, or any part thereof.

Ninth.

And the plaintiff further alleges upon information and belief, that the defendants Milton Frease, Charles L. Ward, The Hamberger Company, a corporation, The Mathushek Piano Manufacturing Company, a corporation, Charles W. Johnson Trustee, Herbert N. Johnson, Solomon Karpen, Oscar Karpen and Adolph Karpen, co-partners doing business under and by the firm name of S. Karpen and Brothers, Edward W. Speed as administrator of the estate of William B. Franklin, deceased, Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a corporation, and Pennington County a public corporation of the State of South Dakota, and each of them

have or claim to have some interest in or lien upon said mortgaged premises aforesaid, or some part thereof, as mortgagees or judgment creditors or otherwise; but which said interest or claims, if any, are subsequent to and inferior to the lien of plaintiff's mortgage above mentioned. And plaintiff further alleges that as to said defendants last above mentioned, and as to all the defendants in this action except the defendants, Patrick B. McCarthy and Maggie McCarthy, no personal claim is made by the plaintiff.

Wherefore, the plaintiff demands judgment against the defendants Patrick B. McCarthy and Maggie McCarthy for the amount of principal and interest which may be found due to the plaintiff on said notes and said mortgage at the date of such judgment, and the costs and expenses of this action, together with the further sum of twenty-five dollars the statutory attorney's fees stipulated for as aforesaid; and that the defendants above named and all persons claiming or to claim under them or either or any of them subsequent to the commencement of this action, may be forever barred
525 and foreclosed of all right, title claim, interest and equity of redemption in the said mortgaged premises above described and every part thereof; that said mortgaged premises may be decreed to be sold according to law that out of the monies arising from such sale, the plaintiff may be paid the amount adjudged to be due on account of said note and mortgage, with interest to the time of such payment, and the costs and expenses of sale, together with the attorney's fees as aforesaid; so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Patrick B. McCarthy and Maggie McCarthy may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief, or both, in the premises as shall be just and equitable.

FOWLER & WHITFIELD,
Attorneys for the Plaintiff.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

James Halley being first duly sworn deposes and says that he is an officer, viz: is cashier of the above named plaintiff corporation, the First National Bank of Rapid City, South Dakota, that he has read the above and foregoing complaint and understands the contents thereof, and that the same is true to his own personal knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

JAMES HALLEY.

Subscribed in my presence and sworn to before me this twenty-sixth day of January, A. D. 1897.

ASHER K. THOMAS,
Notary Public.

[SEAL.]

Exhibit 5.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff,

versus

526 Patrick B. McCarthy, Maggie McCarthy, Milton Frease, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation; and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Decision.

This cause coming on regularly for trial at the regular adjourned March, A. D. 1897 term of said court, and being tried to said court without a jury upon the regular call of the calendar on the twenty-fourth day of April, A. D. 1897, the same being a day of said adjourned term of said court; the plaintiff appearing by its attorneys Fowler & Whitfield, and the defendants Patrick B. McCarthy and Maggie McCarthy appearing in person and by their attorney Charles W. Brown Esq., the other defendants not appearing either in person or by attorney; and the court having heard the evidence adduced and having considered the same; and having heard the argument of counsel and being fully advised in the premises, and having announced its decision in favor of said plaintiff and against the defendants Patrick B. McCarthy and Maggie McCarthy on all the issues in said cause, now makes and files the following findings of fact and conclusions of law.

Findings of Fact.

First. That the plaintiff, the First National Bank of Rapid City, South Dakota, is a banking corporation, organized and existing under the laws of the United States, and having its principal place of business at Rapid City, South Dakota.

Second. That on the twenty-second day of July A. D. 1891, at Rapid City, South Dakota, the defendants Patrick B.
527 McCarthy in and by the name P. B. McCarthy, and Maggie McCarthy, for value received, duly made, executed and delivered to the plaintiff, their certain promissory note in writing dated on that day, and thereby promised to pay to the order of the plaintiff, in six months after said date, the sum of five thousand dollars.

with interest thereon at the rate of twelve per cent per annum from date until paid.

Third. That to secure the payment of the principal sum and the interest mentioned in said promissory note, said defendants Patrick B. McCarthy, and Maggie McCarthy, did at the same time execute under their hands, duly acknowledge and deliver to the plaintiff, their certain mortgage, bearing even date with said note, the acknowledgment of the said execution of which said mortgage bears date the 24th day of July, 1891; whereby said defendants Patrick B. McCarthy and Maggie McCarthy mortgaged to the said plaintiff, the First National Bank of Rapid City, South Dakota, in fee, certain lands and real estate situated in the County of Pennington and State of South Dakota, and described in said mortgage as follows, viz: Lots numbered fifteen (15) and sixteen (16) in block numbered eighty-five (85) of the Original Townsite of Rapid City, Pennington County, South Dakota, as shown on the official plat of said Rapid City, South Dakota, on file in the office of the register of deeds of Pennington County, South Dakota, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining. Which said mortgage contained a condition for the payment of said sum of five thousand dollars with interest at the rate and at the time and in the manner specified in said note, and according to the conditions of said note, to-wit: interest and principal being due and payable six months after the date of said note.

Fourth. That said defendants Patrick B. McCarthy and Maggie McCarthy covenanted and agreed in said mortgage that in case of the foreclosure or commencement of foreclosure thereof, they would pay statutory attorney's fees in addition to the taxable costs of said foreclosure suit.

Fifth. That said mortgage was duly acknowledged and
528 certified as to entitle it to be recorded, and the same was afterwards duly recorded in the office of the register of deeds in and for the said County of Pennington and State of South Dakota, on the tenth day *ington and State of South Dakota, on the tenth day* of October, 1891, at 3:30 o'clock p. m. of that day, in Book "17" of Mortgages, at page "14" of the records of said county and state.

Sixth. That the said defendants Patrick B. McCarthy and Maggie McCarthy have failed to comply with the terms of said promissory note and said mortgage, by failing and omitting to pay said principal sum of five thousand dollars mentioned in said note, which became due and payable January 22, 1892, or any part thereof. That no part of said promissory note of five thousand dollars was ever paid except that between February 7th, 1892 and February 17, 1896, interest payments were made thereon amounting in the aggregate to the sum of two thousand sixty-seven and 74-100 ($2,067.74) dollars, leaving due and unpaid on said promissory note on said February 17, 1896, the sum of five thousand six hundred seventy-five dollars and fifty cents ($5,675.50).

Seventh. That on said February 17, 1896, the plaintiff had a settlement or statement of account with the defendants Patrick

B. McCarthy and Maggie McCarthy on account of said promissory note and said mortgage, at which date there was found to be due to the said plaintiff from said defendants the sum of five thousand six hundred seventy-five and 50-100 dollars; and at that time said defendants Patrick B. McCarthy and Maggie McCarthy, the latter in and by the name of Mrs. Maggie McCarthy, as renewal of said first promissory note above mentioned, duly made, executed and delivered to the plaintiff, their two certain promissory notes in writing, dated on said February 17, 1896, one of said notes being for the sum of five thousand dollars, due and payable in four months after date, with interest thereon at the rate of twelve per cent per annum from date until paid; and the other of said two last mentioned promissory notes being for the sum of six hundred seventy-five dollars and fifty cents, and being due and payable in thirty
529 days after said date, with interest thereon at the rate of twelve per cent per annum from said date until paid. Said two promissory notes were not given nor received as an original loan, but being given and received as renewal of the said note of five thousand dollars above mentioned.

Eighth. That said sum of five thousand six hundred seventy-five dollars and fifty cents has not been paid, nor has any part thereof been paid except the sum of thirty dollars, which was paid as interest thereon on July 1, 1896, and the sum of fifty dollars which was paid on account of interest thereon on November 23, 1896. That the plaintiff is now the owner and holder of said two promissory notes last above mentioned and of said mortgage; and there is now due and owing to the plaintiff the First National Bank of Rapid City, South Dakota, a corporation, from said defendants Patrick B. McCarthy and Maggie McCarthy, on said notes and said mortgage the sum of five thousand six hundred seventy-five dollars and fifty cents, together with interest thereon at the rate of twelve per cent per annum from April 1st, 1896, besides the additional sum of twenty-five dollars, the statutory attorney's fees in this action, as stipulated for in said mortgage.

Ninth. That no action or proceeding at law or otherwise has been had to recover the sum so secured by said notes and said mortgage, or any part thereof.

Tenth. That the claims or interest of the defendants Milton Frease, Charles L. Ward, The Hamberger Company, a corporation, The Mathushek Piano Manufacurting Company, a corporation; Charles W. Johnson, Trustee; Herbert N. Johnson, Solomon Karpen, Oscar Karpen and Adolph Karpen, co-partners doing business under the firm name and style of S. Karpen and Brothers; Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a corporation; and Pennington County a public corporation of the State of South Dakota, and each of said defendants, are junior and inferior to the lien of the plaintiff
530 upon said mortgaged premises hereinbefore mentioned and described, and to each and every part thereof.

And as conclusions of law from the foregoing facts, the court now finds and decides:

First. That the plaintiff is entitled to judgment against said defendants Patrick B. McCarthy and Maggie McCarthy for the said sum $5,675.50 with interest at the rate of twelve per cent per annum from April 1, 1897, amounting in the aggregate to the sum of $6,418.99 besides the costs of this action, and the additional sum of twenty-five dollars, as statutory attorney's fees stipulated for in said mortgage.

Second. That the defendants in .. is action, and all persons claiming or to claim under them or either of them subsequent to the commencement of this action, be forever barred and foreclosed of all right, title, claim or interest or equity of redemption in and to said mortgaged premises or any part thereof.

Third. That the said mortgaged premises above mentioned may be decreed to be sold according to law; and that out of the moneys arising from such sale the plaintiff be paid the amount found to be due as aforesaid, with interest to the time of such payment, and the costs and expenses of sale, together with attorney's fees as aforesaid; so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Patrick B. McCarthy and Maggie McCarthy be adjudged to pay any deficiency which may remain after applying all of said monies so applicable thereto.

Let the judgment and decree of this court be entered accordingly.

Done in open court this fourth day of May, A. D. 1897.

By the court.

WILLIAM GARDNER, *Judge*.

Endorsed: "Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota. First Nat'l Bank of Rapid City, a corporation, Plff. vs. Patrick B. McCarthy et al. Dfts. Findings of Fact and Conclusions of Law of the Court. Filed May 6th, 1897. 531 John P. McElroy Jr., Clerk of Courts. Fowler & Whitfield Attorneys for Plaintiff. Personal service by copy of the within Findings and Conclusions is hereby admitted this 7th day of May, A. D. 1897. Charles W. Brown, Attorney for Defendants Patrick B. McCarthy, Maggie McCarthy, Mathushek Piano M'f'g Co."

EXHIBIT 6.

In the Circuit Court of the Seventh Judicial Circuit, in and for Pennington County, South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Judgment and Decree of Foreclosure and Sale.

This cause coming on regularly for trial at the regular adjourned March A. D. 1897, term of said court, and being tried to said court, before the Honorable William Gardner, the judge thereof, without a jury, upon the regular call of the calendar on the twenty-fourth day of April, A. D. 1897 the same being a day of the said adjourned March term of said court; the plaintiff appearing by its attorneys, Fowler & Whitfield; the defendants Patrick B. McCarthy and Maggie McCarthy appearing in person and by their attorney Charles W. Brown, Esq. the other defendants not appearing either in person or by attorney, except that the defendants Milton Frease, Charles L. Ward, Midland State Bank, a corporation; Solomon
532 Karpen, Oscar Karpen, and Adolph Karpen, co-partners under the name and style of S. Karpen and Brothers; Thomas C. Blair, Albert Amsbury, and Omaha National Bank, a corporation; appeared and by their separate answer disclaimed any right, title or interest in or to the mortgaged premises mentioned in the complaint and which are hereinafter described, superior to the mortgage lien of the plaintiff thereon; and it being proven to the satisfaction of the court that the summons, verified complaint and notice of no personal claim in this action have been duly and personally served upon the defendants Herbert N. Johnson, Charles W. Johnson, Trustee, Edward W. Speed as administrator of the estate of William B. Franklin, deceased, John J. Fayel, Pennington County a public corporation of the State of South Dakota, The Hamberger Company, a corporation and the Mathushek Piano Manufacturing Company, a corporation; and upon each of them, more than thirty days before the trial of said cause and before this date; and it further appearing to the satisfaction of the court that more than thirty days have elapsed since such service upon said last named defendants

herein; and that no answer or demurrer, or copy of either to the complaint of plaintiff has been served upon or received by the attorneys for the plaintiff; and that neither of said defendants last above named have made appearance herein either in person or by attorney, except that said defendants Pennington County, a public corporation, The Hamberger Company, a corporation, and the Mathushek Piano Manufacturing Company, a corporation, appeared by their respective attorneys more than thirty days before the trial of this cause, and before this date, and demanded a copy of the complaint herein, which said complaint was thereupon served upon and received by the said attorneys for said respective defendants, more than thirty days before the trial hereof and before this time; but that no answer or demurrer or copy of either to the complaint was served by either of said defendants last named. And this cause coming on to be heard as aforesaid upon the allegations of the complaint herein, and the separate answer of the defendants Patrick B. McCarthy and Maggie McCarthy to such complaint and the
533 plaintiff's reply to said separate answer, and the proofs adduced; and the court having heard said allegations and the proofs adduced and having considered the same; and having heard the arguments of counsel and being fully advised in the premises; and having heretofore made and filed its findings of fact and conclusions of law in this case; now upon motion of Fowler & Whitfield, attorneys for the plaintiff, it is by the court ordered and adjudged that the plaintiff, First National Bank of Rapid City, South Dakota, have and recover of and from the defendants Patrick B. McCarthy and Maggie McCarthy, the sum of five thousand six hundred seventy-five dollars and fifty cents, with interest thereon at the rate of twelve per cent per annum from April 1, 1896, amounting at this time to the sum of six thousand four hundred eighteen dollars and ninety nine cents principal and interest besides the costs of this action, including the additional sum of twenty-five dollars, the statutory attorney's fees stipulated for in said mortgage, and which said costs have been agreed upon and taxed by the parties to this action at the sum of forty-one dollars and seventy cents; said sum amounting in all to the aggregate sum of six thousand four hundred sixty dollars and sixty-nine cents ($6,460.69).

It is by the court ordered, adjudged and decreed, that the mortgaged premises described in the complaint in this action, and which is hereinafter described, or so much thereof as may be sufficient to raise the amount so found and adjudged to be due to the plaintiff for principal, interest and costs, taxed and agreed upon as aforesaid, and the expenses of sale, and which may be sold separately without material injury to the parties interested, be sold by public auction at the front door of the court house in the city of Rapid City, in Pennington County, South Dakota, by or under the direction of the sheriff of said county, upon the like notice and in the same manner as provided by law for the sale of real property upon execution. That the plaintiff or any other party to this action may become the purchaser on such sale. That said sheriff execute to the purchaser or purchasers a certificate of such sale, and upon the

confirmation of the report thereof, and the expiration of the
534 time allowed by law for the redemption of said premises
therefrom, if said premises are not then redeemed, that said sheriff or his successor in office made to the holder of said certificate or certificates a deed or deeds of the premises sold. That out of the proceeds of the sale, after first deducting the amount of his fees, disbursements and commissions on said sale, the said sheriff pay to the plaintiff, or to Fowler & Whitfield, plaintiff's attorneys, the said amount so found and adjudged to be due as aforesaid, viz: Six thousand four hundred sixty dollars and sixty-nine cents ($6,460.69), together with interest thereon as aforesaid from this date, or so much thereof as the said proceeds of sale will pay of the same; and that he take a receipt of the plaintiff or its said attorneys, Fowler & Whitfield, for the amount so paid, and file the same with his report of sale. That said sheriff pay the surplus monies arising from such sale, if any, to the clerk of this court, and that he make a report of such sale and his doings in the premises and file the same with the clerk of this court with all convenient speed. That the purchaser or purchasers at such sale be let into possession of the premises on production of the sheriff's deed for the same or any part thereof.

And it is further ordered, adjudged and decreed that if the proceeds of such sale be insufficient to pay the amount so adjudged to be due to the plaintiff, with interest and costs and expenses aforesaid, the said sheriff shall specify the amount of such deficiency in his report of sale, and that the said defendants Patrick B. McCarthy and Maggie McCarthy pay the same to the plaintiff, with interest from the day of sale and that the plaintiff have execution thereof against the property of said defendants Patrick B. McCarthy and Maggie McCarthy.

And it is further ordered, adjudged and decreed by the court, that the defendants and each of them, and all persons claiming under them or any of them after the commencement of this action, and after the filing of the complaint herein, be forever barred and foreclosed of all right, title, interest and equity of redemption in
and to the said mortgaged premises, and every part thereof,
535 unless the same shall be duly redeemed within one year from the date of sale, or such further time as is provided by law.

And it is further ordered, adjudged and decreed by the court that all personal taxes assessed and levied against the defendants or either of them and which purport to be a lien upon said mortgaged premises or any part thereof, subsequent to the date of the filing of the mortgage mentioned in the complaint for record, to-wit: subsequent to the tenth day of October, 1891, be and the same are hereby declared to be junior and inferior to the lien of plaintiff's mortgage; and the lien of said personal taxes, if any there be, is junior and inferior to the lien of this judgment and decree. And the lien for all personal taxes against any of the defendants to this action which has accrued since the tenth day of October, 1891, is hereby cancelled and declared null and void as against this decree, and junior and inferior to the rights acquired hereunder.

The following is a description and the particular boundaries of the said mortgaged premises to be sold as hereinbefore decreed, to-wit: All those tracts or parcels of land lying and being in the County of Pennington and State of South Dakota, described as follows, to-wit: Lots numbered fifteen (15) and sixteen (16) in block numbered eighty-five (85) of the original townsite of Rapid City, Pennington county, South Dakota, as shown on the official plat of said Rapid City, S. D. on file in the office of the Register of Deeds, Pennington county, South Dakota, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Done in open court at Rapid City, South Dakota, this fourth day of May, A. D. 1897.

By the court.

WILLIAM GARDNER, *Judge.*

Attest:

JOHN P. McELROY, Jr., *Clerk.*

Endorsed: "Circuit Court. Seventh Judicial Circuit. Pennington county, South Dakota. First Nat'l Bnk of Rapid City, etc., vs. Patrick B. McCarthy. Judgment & Decree filed May 10, 536 1897. John P. McElroy Jr., Clerk of Courts. Fowler & Whitfield, attorneys for plaintiff. Due personal service by copy of the within Judgment & Decree is hereby admitted this 7 day of May A. D. 1897. Charles W. Brown, Attorney for def'ts, Patrick B. McCarthy and wife."

EXHIBIT 7.

In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. McCARTHY, MAGGIE McCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation; and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Notice of Intention.

Take notice, that the above named defendants, Patrick B. McCarthy and Maggie McCarthy, intend to move the court to vacate and set aside its decision herein, and the judgment rendered thereon, and to grant a new trial of this action, upon the following grounds, to-wit:

1st. Insufficiency of the evidence to justify the verdict, and that the verdict is against law.

2d. Errors in law occurring at the trial and duly excepted to by said defendants.

Said motion will be made upon a Bill of Exceptions hereinafter to be prepared, settled and served and filed.

Dated at Rapid City, South Dakota, this 29th day of No-
537 vember, A. D. 1897.

CHARLES W. BROWN,
Attorney for said Defendant.

To Messrs. Fowler & Whitfield, Attorneys for Plaintiff.

EXHIBIT 8.

In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants.

Notice of Motion for a New Trial.

Take notice, that the undersigned will move the court at the court house in Rapid City, in said county on the 17th day of June, A. D. 1898, at two o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, to vacate and set aside the findings of fact and conclusions of law herein, and the judgment rendered thereon, and to grant a new trial of this action, and for general relief.

Said motion will be made upon the judgment roll, and upon the Bill of Exceptions certified and settled herein on the 16th day of March, 1898, and upon all the papers, affidavits, records and proceedings herein (except the affidavits heretofore served on behalf of the plaintiff) and upon the notice of intention herein as the same may be amended by the court; and will be urged upon the following grounds materially affecting the substantial rights of the answering defendants Patrick B. McCarthy and Maggie McCarthy, to-wit:

1. Accident and surprise, which ordinary prudence could not have guarded against, in this that since the trial thereof the court house was burned and the stenographer's official notes of the testimony herein were destroyed by fire, and that William Gard-
538 ner, the judge before whom said cause was tried, signed and certified two separate bills of exceptions herein, which bills are wholly repugnant to and inconsistent to each other.

2. The court erred in making its findings of fact number eight, for the reasons that it appears by the undisputed evidence that the original loan made by the plaintiff to the answering defendants was the sum of four thousand dollars and no more, as evidenced by the

four thousand dollar note of date August 7, 1888, and the said four notes each for one thousand dollars, dated August 22, 1887, of which four notes the said $4,000 was a mere renewal; that said $4,000 note was usurious, bearing by its terms interest thereon at the rate of eighteen per cent per annum; that the notes described in the complaint are a mere renewal of the said $4,000 note and the usurious interest accrued thereon; that no other loan was ever made by the plaintiff to the answering defendants except said original loan of $4,000 and that the balance of the principal purporting to be due upon the notes described in the complaint, over and above the sum of $4,000 is for mere usurious interest that said illegal interest although merged in renewal notes bearing legal interest, cannot be recovered by the plaintiff, nor is the plaintiff entitled to recover any interest on the renewal notes described in the complaint, and the plaintiff would not in any event be entitled to recover upon the notes described in the complaint any sum of money over and above said $4,000. That on November 30, 1895, the answering defendants paid to the plaintiff, from monies received from said Franklin judgment, the sum of $500.65 and between July 1, 1892, and the commencement of this action they paid to the plaintiff, from the monies received as rent of their premises, the sum of $643 amounting in all to $1,143.65; that neither at the time of the payment of said several sums amounting to $1,143.65 nor at any other time, was any direction ever given by the answering defendants to the plaintiff as to the application of said payments, or either of them, and the said payments ought to be credited and applied upon the principal of said indebtedness, to-wit: upon said sum of $4,000.

539 3. The court erred in making the finding of fact number six, for all the reasons hereinbefore specified, and for the further reason that it appears by the undisputed evidence that the answering defendants, before this action paid to the plaintiff upon the indebtedness alleged in the complaint, the sum of $2,686.47, and the answering defendants were entitled to set off the whole thereof against said original indebtedness and loan of $4,000; and the court should have found that there was due to the plaintiff upon the notes and mortgage described in the complaint, at the time of the entry of judgment herein, the sum of $1,313.53 and no more.

4. The court erred in making its conclusions of law numbered first and third, for all the reasons hereinbefore specified.

5. The said findings of the court numbered six and eight and its said conclusions of law numbered first and third, and the judgment of the court, are erroneous, and contrary to law, for all the reasons hereinbefore specified.

6. The evidence is insufficient to justify the court's said sixth and eighth findings of fact, and the judgment rendered thereon, in the particulars hereinbefore set out.

Dated at Rapid City, South Dakota, this 8th day of June, A. D. 1898.

EDMUND SMITH,
CHARLES W. BROWN,
Attorneys for Defendants, Patrick B. McCarthy and Maggie McCarthy.

To Messrs. Fowler & Whitfield, Attorneys for Plaintiff.

Due and personal service by copy of the within notice of motion is hereby admitted and accepted at Rapid City, South Dakota, this 8th day of June, A. D. 1898.

FOWLER & WHITFIELD,
Attorneys for Plaintiff.

540 EXHIBIT 9.

In Circuit Court, Seventh Judicial Circuit.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation,
vs.
PATRICK B. McCARTHY and MAGGIE McCARTHY et al., Defendants.

Order Granting New Trial.

The motion of the above named defendants, Patrick B. McCarthy and Maggie McCarthy, to vacate and set aside the findings of fact and conclusions of law herein, and the judgment rendered thereon, and to grant a new trial of this action, having come on regularly to be heard before the court at the court house in this county on the 17th day of June, 1898, pursuant to notice duly served; the said defendants appearing by Mr. Edmund Smith and Charles W. Brown their attorneys in support of said motion, Messrs. Fowler & Whitfield, plaintiff's attorneys, appearing in opposition thereto and the court having heard the arguments of counsel and being full advised in the premises;

It is by the court ordered that said motion be granted, and that the said findings of fact and conclusions of law herein, and the judgment rendered thereon, be, and the same hereby are, in all things vacated and set aside.

It is further ordered that the said defendants forthwith pay to the clerk of this court for the use of the plaintiff the sum of $36.70 the same being the amount of the accrued costs of the sale of the mortgaged premises heretofore made herein, and that this action shall stand for trial at the present regular March adjourned 1898 term of said court.

Done in open court at the court house in said county this
541 18th day of June, 1898.

By the court.

LEVI McGEE, *Judge.*

To which order and rulings the plaintiff at the time duly excepted, and at its request this exception is signed and allowed.

LEVI McGEE, *Judge.*

Endorsed: "P. 217. First National Bank of Rapid City, South Dakota, a corporation, vs. Patrick B. McCarthy, Maggie McCarthy, et al. Order Granting New Trial. Filed June 22d, 1898. John P. McElroy, Jr., Clerk of Courts."

Exhibit 10.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff and Appellant,

vs.

Patrick B. McCarthy and Maggie McCarthy et al., Defendants and Respondents.

Notice of Appeal to Supreme Court.

To Edmund Smith, Esq., and Charles W. Brown, Esq., Attorneys for Patrick B. McCarthy and Maggie McCarthy, the above named defendants and respondents; and to John P. McElroy, Jr., Clerk of said Circuit Court.

Please take notice. That the above named First National Bank of Rapid City, South Dakota, a corporation, the plaintiff and appellant herein, appeals of the Supreme Court of the State of South Dakota, from that certain order of the said circuit court above named entered herein on June 22, 1898, in the Order Book of the Clerk of said Court at page 217 thereof, and which is in words and figures following, viz:

542 "State of South Dakota,
County of Pennington:

In Circuit Court, Seventh Judicial Circuit.

"First National Bank of Rapid City, a Corporation, Plaintiff,

vs.

"Patrick B. McCarthy and Maggie McCarthy, et al., Defendants.

Order Granting New Trial.

"The motion of the above named defendants, Patrick B. McCarthy and Maggie McCarthy, to vacate and set aside the findings of fact and conclusions of law herein, and the judgment rendered thereon, and to grant a new trial of this action, having come on regularly to be heard before the court at the court house in said county on the 17th day of June, 1898, pursuant to notice duly served; the said defendants appearing by Mr. Edmund Smith and Chas. W. Brown, their attorneys in support of said motion, Messrs. Fowler & Whitfield, plaintiff's at-orneys appearing in opposition

thereto, and the court having heard the arguments of counsel and being fully advised in the premises:

"It is by the Court ordered, that said motion be granted, and that the said findings of fact and conclusions of law herein, and the judgment rendered thereon be, and the same hereby are in all things vacated and set aside.

"It is further ordered that the said defendants forthwith pay to the clerk of this court for the use of the plaintiff the sum of $36.70 the same being the amount of the accrued costs of the sale of the mortgaged premises heretofore made herein, and that this action shall stand for trial at the present regular March adjourned 1898 term of said court.

"Done in open court at the court house in said county, this 18th day of June, 1898. By the court. Levi McGee, Judge."

And this appeal is from the whole of said order.

Dated this 21st day of July, A. D. 1898.

FOWLER & WHITFIELD,
Attorneys for Plaintiff and Appellant.

Endorsed: "No. 352. Circuit Court, Seventh Judicial Circuit. Penn. County, South Dakota, First Nat'l Bank, etc. vs. 543 Patrick B. McCarthy et al. Notice of Appeal from order granting a new trial. Personal service by copy of the within notice of appeal is hereby admitted this 21st day of July, A. D. 1898, Charles W. Brown & Edmund Smith, Attorneys for Respondents. John P. McElroy, Jr., Clerk of said court. Fowler & Whitfield, Attorneys for Appellant. Filed July 21, 1898, John P. McElroy, Jr., Clerk of Courts."

Exhibit 11.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff and Appellant,

vs.

Patrick B. McCarthy and Maggie McCarthy et al., Defendants and Respondents.

Undertaking on Appeal to Supreme Court.

Whereas, On the 18th day of June, A. D. 1898, in the Circuit Court within and for the County of Pennington, an order was made by the court in favor of the respondents and against the appellant vacating and setting aside the findings of fact and conclusions of law theretofore made herein, and the judgment rendered thereon, and granting a new trial of this action; which order was filed with the clerk of said Circuit Court on June 22, 1898, and entered in the Order Book of said clerk at page 217 thereof. And the above

named appellant feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of South Dakota.

Now Therefore, We do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, or on a dismissal thereof, not exceeding the sum of two hundred fifty ($250.00) dollars; and do also undertake that if the said order so appealed from, or in any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by said order, or the part of such amount as to which the said order shall be affirmed, if it be affirmed only
541 in part; and all damages and costs which shall be awarded against said appellant on said appeal, not exceeding said sum of two hundred fifty ($250.00) dollars.

Dated this 21st day of July, A. D. 1898.

JAMES HALLEY.
JOHN J. McNAMARA.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

On this 21st day of July, A. D. 1898, before me, Fred H. Whitfield, a notary public within and for said county and state, personally appeared James Halley and John J. McNamara, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

FRED H. WHITFIELD.
[SEAL.] *Notary Public.*

Justification of Sureties.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

James Halley and John J. McNamara, being duly sworn, each for himself deposes and says that he is one of the sureties above named; that he is a resident and freeholder of South Dakota, and is worth the sum of two hundred fifty dollars specified in the foregoing undertaking, above his debts and liabilities, in property within this state, not exempt by law from execution.

JAMES HALLEY.
JOHN J. McNAMARA.

Subscribed and sworn to before me this 21st day of July, A. D. 1898.

FRED H. WHITFIELD.
[SEAL.] *Notary Public.*

Endorsed: "No. 1543. Circuit Court, Seventh Judicial Circuit, Penn. County, South Dakota. First Nat'l Bank, etc., vs. Patrick B. McCarthy, et al. Undertaking on Appeal from order granting a new trial. Personal service by copy of the within Undertaking is

hereby admitted this 21st day of July, A. D. 1898. Charles W. Brown & Edmund Smith, attorneys for Respondents. John
545 P. McElroy, Jr., Clerk of said Court. Fowler & Whitfield, Attorneys for Appellant. Filed July —, 1898, John P. McElroy, Jr., Clerk of Courts."

EXHIBIT No. 12.

In the Supreme Court, State of South Dakota.

Be it remembered, that at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1900 on the 34th day of the term, to-wit: On the 11th day of July, A. D. 1900.

Present: Howard G. Fuller, presiding judge, and Dighton Corson and Dick Haney, judges of said court, the following proceedings were had, and the following judgment was entered, to-wit:

In the Supreme Court of the State of South Dakota, April Term, A. D. 1900.

Present: Howard C. Fuller, presiding judge, Dighton Corson and Dick Haney, judges of said court, and the officers thereof.

File No. 1223.

FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Plaintiff and Appellant,
vs.
PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants and Respondents.

This action coming on to be heard at the October, A. D. 1898 term of this court, at the Supreme Court room, in the City of Pierre, State of South Dakota, upon the merits of the appeal, the same having been argued by J. W. Fowler for the appellant and C. W. Brown for respondents, and the court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the order of the circuit court within and for Pennington county, appealed from herein, be and the same is hereby affirmed.

And it is further ordered that this action be and is hereby remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged that respondents
546 have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at one hundred ten and 70/100 dollars.

By the Court.

H. G. FULLER,
Presiding Judge.

Attest:

[SEAL.] JESSIE FULLER, *Clerk.*

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, Jessie Fuller, clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of Judgment and Order of the Supreme Court of the State of South Dakota, in the above entitled action wherein the First National Bank of Rapid City, South Dakota, is plaintiff and appellant versus Patrick B. McCarthy and Maggie McCarthy et al., defendants and respondents as the same now remains of record in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 11th day of August, A. D. 1900.

JESSIE FULLER, *Clerk*.
By SOPHIA G. DELAND, *Deputy*.

Costs and disbursements taxed and allowed as follows:

Costs.

Before Argument	$5.00
For Argument	15.00
Making and serving case	5.00

Disbursements.

Clerk's fees to perfect Appeal Record	
Stenographer's fees to perfect Appeal Record	
Printing Brief	$33.00
Printing Additional Abstract	36.75
Fees Clerk Supreme Court less $10 paid by Appellant	13.95
Sheriff's Fees for Serving additional Abstract	2.00
Total	$110.70

547 Endorsed: "File No. 1223. In Supreme Court, State of South Dakota, April Term, 1900. The First National Bank of Rapid City, Plaintiff and Appel. vs. Patrick B. McCarthy et al., Defendants and Resp'd'ts. Filed in open court this 11th day of July, 1900. Jessie Fuller, Clerk. Remittitur filed August 16, 1900. John P. McElroy, Clerk of Courts."

EXHIBIT 13.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff.

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Ansbury, John J. Favel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Supplemental Complaint.

Comes now the plaintiff above named, by leave of court first had and obtained, and makes, serves and files this as its supplemental complaint; and for cause of action against the defendants says and alleges:

First.

That the plaintiff, the First National Bank of Rapid City, South Dakota, is a banking corporation organized and existing under the laws of the United States, and having its principal place of business at Rapid City, South Dakota.

Second.

That on the 22d day of July, 1891, at Rapid City, South Dakota, the defendants, Patrick B. McCarthy, in and by the name
548 of P. B. McCarthy, and Maggie McCarthy, for value received, duly made, executed and delivered to the plaintiff, their certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, in six months after said date, the sum of five thousand dollars, with interest thereon at the rate of twelve per cent per annum from said date until paid.

Third.

That to secure the payment of the principal sum and the interest mentioned in said promissory note, the defendant Patrick B. McCarthy, in and by the name of P. B. McCarthy, and Maggie McCarthy, did, at the same time execute under their hands, duly acknowledge and deliver to the said plaintiff, their certain mortgage bearing even date with said promissory note, the acknowledgement of the execution of which said mortgage bears date the 24th day of July,

1891, whereby the said defendants Patrick B. McCarthy and Maggie McCarthy mortgaged to the plaintiff, First National Bank of Rapid City, South Dakota, a corporation, in fee, certain lands and real estate situated in the County of Pennington and State of South Dakota, and described in said mortgage as follows, to-wit: Lots numbered fifteen (15) and sixteen (16) in block numbered eighty-five (85) of the Original Townsite of Rapid City, Pennington County, South Dakota, as shown on the official plat of said Rapid City, South Dakota, on file in the office of the Register of Deeds of Pennington County, South Dakota. Which said mortgage contained a condition for the payment of said sum of five thousand dollars with interest at the rate and at the time and in the manner specified in said note, and according to the conditions of said note, to-wit: Interest and principal being due and payable six months after the date of said note. And said mortgage also contained a further condition that said mortgagors would pay the taxes assessed and to be assessed against said mortgaged premises as the same became due and collectable; and that in case said defendants Patrick B. McCarthy and Maggie McCarthy, mortgagors failed or neglected to pay said
549 taxes and all charges against the said mortgaged premises; then said plaintiff, the mortgagee could pay the same, and said mortgage would stand as security for the payment of any and all sums so paid out or advanced by said mortgagee; and said sums should bear interest at the rate of twelve per cent per annum from the date of such payment until paid.

Fourth.

That said defendants Patrick B. McCarthy and Maggie McCarthy covenanted and agreed in said mortgage that in case of the foreclosure or commencement of foreclosure thereof, they would pay statutory attorneys fees in addition to the taxable costs of said foreclosure suit.

Fifth.

That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards duly recorded in the office of the Register of Deeds in and for the County of Pennington and State of South Dakota, on the 10th day of October, 1891, at 3:30 o'clock p. m. in Book 17 of Mortgages, page 14 of the records of said Pennington County.

Sixth.

That the said defendants Patrick B. McCarthy and Maggie McCarthy have failed to comply with the terms of said promissory note and mortgage, by failing and omitting to pay said principal sum of five thousand dollars mentioned in said note, which became due and payable January 22, 1892, or any part thereof; and plaintiff alleges the fact to be that the said promissory note has not been paid, nor has any part thereof been paid except that between the 7th day of February, 1892, and the 17th day of February, 1896, interest payments were made thereon amounting in the aggregate

to two thousand sixty-seven and 74-100 ($2,067.74) dollars, leaving still due and unpaid on account of said promissory note, on February 17, 1896, the sum of five thousand six hundred and seventy-five and 50-100 ($5,675.50) dollars. And said defendants Patrick B. McCarthy and Maggie McCarthy further failed and neglected to pay the taxes assessed or levied against said mortgaged premises for the years 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898 or 1899, or for either of said years, which said taxes, amounting to $1,484.00 the plaintiff has been obliged to pay to protect its security and lien upon said mortgaged premises at the time and manner hereinafter stated.

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Seventh.

That on said 17th day of February, 1896, said plaintiff and said defendants Patrick B. McCarthy and Maggie McCarthy had a statement or accounting of the amount due on said promissory note and said mortgage, at which time there was found and agreed to be due thereon to the plaintiff from said defendants the sum of five thousand six hundred seventy five and 50-100 ($5,675.50) dollars and at which time said defendants Patrick B. McCarthy and Maggie McCarthy, the latter in and by the name of Mrs. Maggie McCarthy, as renewal of said first promissory note above mentioned, duly made, executed and delivered to the plaintiff, their two certain promissory notes in writing dated on that day, one of said notes being for the sum of five thousand dollars due and payable in four months after said date with interest thereon at the rate of twelve per cent per annum from date until paid; and the other of said two last mentioned promissory notes being for the sum of six hundred seventy-five and 50-100 dollars ($675.50) and being due and payable in thirty days after said date with interest thereon at the rate of twelve per cent per annum from said date until paid. Said two promissory notes not being an original loan, but were given as renewal of said note of $5,000 hereinbefore mentioned with the accumulated unpaid interest thereon to said date. That said sum of $5,675.50 has not been paid, nor has any part thereof been paid except the sum of thirty dollars paid on account of interest thereof July 1, 1896, and fifty dollars paid on account of interest thereon November 23, 1896; and plaintiff is still the owner and holder of said two notes last mentioned and said mortgage; and there is now justly due and owing the plaintiff from said defendants Patrick B. McCarthy and Maggie McCarthy on said note and mortgage, for the principal sum and interest thereon, said sum of $5,675.50 with interest at the rate of twelve per sent per annum from April 1, 1896; besides the additional sum of twenty-five dollars, the statutory attorneys' fees in this action and the sums advanced by plaintiff on account of taxes upon said mortgaged premises, as follows, to-wit: That on March 23, 1898, the plaintiff paid the taxes against said mortgaged premises under the provisions of said mortgage for the year 1890, in the sum of one hundred seventy-four and 20-100; for the year 1891 in the sum of one hundred eighty-nine and 20-100 dollars; for the year 1892, in the sum of

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two hundred eight and 11-100 dollars; for the year 1893 in the sum of one hundred fifty-seven and 1-100 dollars; for the year 1894 in the sum of one hundred forty-one and 71-100 dollars; for the year 1895 in the sum of one hundred thirty-three and 47-100 dollars; for the year 1896 in the sum of one hundred fifty-one and 13-100 dollars; and for the year 1897 in the sum of one hundred forty-two and 18-100 dollars. On May 26, 1899, the plaintiff paid the taxes for the year 1898 against said premises in the sum of ninety-nine and 73-100 dollars; on February 16, 1900, plaintiff paid the first half of the taxes for the year 1899 in the sum of forty-three and 64-100 dollars; and September 19, 1900, the plaintiff paid the last half of the taxes for the year 1899 upon said premises in the sum of forty-three and 63-100 dollars; all of which payments were made under the provisions of said mortgage above mentioned, and to protect the mortgage lien of the plaintiff thereon; and there is now due and owing to the plaintiff from said defendants Patrick B. McCarthy and Maggie McCarthy on account of said payments, the sum of fourteen hundred eighty-four dollars, with interest on forty-three and 63-100 dollars thereof from February 16, 1900, on forty-three and 64-100 dollars thereof from September 19, 1900; ninety-nine and 73-100 dollars thereof from May 26, 1899, and on twelve hundred ninety-seven dollars thereof from March 23, 1898, all at the rate of twelve per cent per annum no part of which has been paid.

Eighth.

552 And plaintiff further alleges that no action or proceedings have been had at law or otherwise to recover the sum so secured by said notes and mortgage or any part thereof; except that a tax deed was issued to plaintiff for the taxes against said mortgaged premises for the year 1894, and an action was commenced for the possession of said premises under said tax deed; but said action has been dismissed and is not now being prosecuted.

Ninth.

And plaintiff further alleges upon information and belief that the defendants Milton Frease, Charles L. Ward, The Hamberger Company, a corporation; The Mathushek Piano Manufacturing Company, a corporation; Charles W. Johnson, trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, copartners doing business under and by the firm name of S. Karpen Brothers; Edward W. Speed as administrator of the estate of William B. Franklin, deceased; Thomas C. Blair; Albert Ansbury; John J. Fayel; Omaha National Bank, a corporation; and Pennington County a public corporation of the State of South Dakota; and each of them have or claim to have some interest in or lien upon said mortgaged premises aforesaid or some part thereof, as mortgagees, judgment creditors or otherwise; but which said interests or claims, if any, are subsequent to and inferior to the lien of plaintiff's mortgage above mentioned. And plaintiff further alleges that as to said defendants last above mentioned, and as to all defendants

in this action except the defendants Patrick B. McCarthy and Maggie McCarthy, no personal claim is made by the plaintiff.

Wherefore plaintiff demands judgment against the defendants Patrick B. McCarthy and Maggie McCarthy for the amount of the principal and interest and money advanced for taxes upon said mortgaged premises which may be found to be due upon said notes and mortgage at the date of such judgment and the costs and expenses of this action, together with the further sum of twenty-five dollars the statutory attorney's fees stipulated for as aforesaid; and
553 that the defendants above named, and all persons claiming or to claim under them or either or any of them subsequent to the commencement of this action, may be forever barred and foreclosed of all right, title, claim, interest and equity of redemption in the mortgaged premises above described, and every part thereof. That the said mortgaged premises may be decreed to be sold according to law. That out of the monies arising from such sale the plaintiff may be paid the amount adjudged to be due on account of said notes and mortgage and tax payments made by it with interest from the time of such payments, to the time of payment, together with the costs and expenses of sale together with the attorney's fees aforesaid; so far as the amount of such monies so applicable thereto will pay the same, and that the defendants Patrick B. McCarthy and Maggie McCarthy may be adjudged to pay any deficiency which may remain after applying all of said monies so applicable thereto; and that the plaintiff may have such other or farther relief in the premises as shall be just and equitable.

FOWLER & WHITFIELD,
Attorneys for Plaintiff.

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

Herbert W. Somers, being first duly sworn deposes and says he is the cashier of the plaintiff bank in the above entitled action; that he has read and understands the contents of the foregoing supplemental complaint of the plaintiff, and the same is true of his own personal knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

H. W. SOMERS, *Cash.*

Subscribed and sworn to before me this October 1, 1900.

FRED H. WHITFIELD,
[SEAL.] *Notary Public.*

Endorsed: No. 1532. In Circuit Court, Pennington County, South Dakota. First National Bank of Rapid City, South Dakota, a corporation, Plaintiff vs. Patrick B. McCarthy and Maggie McCarthy et al., Defendants. Supplemental Complaint.
554 Filed Oct. 12, 1900. John P. McElroy, Jr., Clerk of Court. Fowler & Whitfield, Attorneys for Plaintiff."

EXHIBIT 15.

In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Copartners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased, Thomas C. Blair, Albert Annsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Amended Separate Answer of Patrick B. McCarthy and Maggie McCarthy.

The defendants Patrick B. McCarthy and Maggie McCarthy for their amended separate answer to the supplemental complaint of the plaintiff, state as follows:

I.

For a first defense to the said supplemental complaint, these defendants deny each and every allegation in said complaint contained, except such allegations as are hereinafter specifically admitted. These defendants admit that the plaintiff is a corporation as alleged in the supplemental complaint, and that on July 22, 1891, the defendant, Patrick B. McCarthy, made to the plaintiff a certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff six months after said date, the sum of five thousand dollars with interest
555 thereon as expressed in said note, at the rate of twelve per cent per annum. That to secure the payment of the principal and interest mentioned in said note, the said Patrick B. McCarthy did, at the same time, execute under his hand and deliver to the plaintiff a certain mortgage bearing even date with said note, the acknowledgement of which bears date July 24, 1891, and that said mortgage contained a condition for the payment of the said sum of five thousand dollars with interest as specified in said note.

II.

For a second defense to said supplemental complaint, and as a counter-claim thereto, these defendants allege that the promissory notes described in the supplemental complaint are mere renewals of a certain promissory note for four thousand dollars, dated August

7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire and D. J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at eighteen per cent per annum from date until paid; which last named note was in turn a mere renewal of four certain original promissory notes, each executed by Patrick B. McCarthy, by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of one thousand dollars, and each and all bearing interest at the rate of eighteen per cent per annum from said date until paid, one of said notes being due ninety days after said date, and another of said notes being due six months after said date, and another of said notes being due nine months after said date, and the remaining note being due twelve months after said date. That no loan of money was ever, at any time, made by the plaintiff to the defendant, Maggie McCarthy, and that the said loan of four thousand dollars, evidenced by the said note of August 7, 1888, and by said four original notes of August 22, 1887, is the only loan or advance of money ever made by the plaintiff to the defendant Patrick B. McCarthy. That at the time of the execution of the note of August 7, 1888, and said four original notes of August 22, 1887, it was corruptly and usuriously agreed between the plaintiff and defendant, Patrick B. McCarthy,
556 and the other signers of said four thousand dollar note, — should pay on said note a higher rate of interest than was then allowed by law, to-wit: interest at the rate of eighteen per cent per annum. And that, at the time of the execution of said four original notes, dated August 22, 1887, it was corruptly and usuriously agreed between the plaintiff and the defendant, Patrick B. McCarthy, that the plaintiff should receive and the defendant, Patrick B. McCarthy, should pay on each of said notes a higher rate of interest than was then allowed by law, to-wit: at the rate of eighteen per cent per annum. That the said five thousand dollar note, mentioned in the supplemental complaint, was a mere renewal of said four thousand dollar note, and the said four original notes dated August 22, 1887, and the consideration therefor was the said indebtedness of four thousand dollars and usurious interest in the sum of one thousand dollars and that the said two notes mentioned in the seventh paragraph of the supplemental complaint are a mere renewal by said Patrick B. McCarthy of the said four thousand dollar note, and the consideration therefor was the said original indebtedness of four thousand dollars and usurious interest thereon in the sum of $1,675.50; and that there was no other consideration for the said notes described in the supplemental complaint than as in this answer set out. That since the 22d day of August, 1887, these defendants have paid or caused to be paid to the plaintiff usurious interest on said four thousand dollar note and the said four original notes of date August 22, 1887, various sums of money amounting in the aggregate to one thousand dollars and upwards, said payments of usurious interest being for interest at a rate exceeding twelve per cent per annum. And these defendants allege that by reason of the usurious character of said original loan and indebtedness as aforesaid, the plaintiff has forfeited all the unpaid interest claimed

to be due upon the said indebtedness, and that these defendants should be permitted to set off against the said original indebtedness of four thousand dollars, the said amount of the payments of usurious interest as aforesaid. That during all the times mentioned in the supplemental complaint and in this answer, these
557 defendants were and are husband and wife, and have with their family resided in Pennington County, and been in the actual occupancy of the premises described in said supplemental complaint as their homestead at all the times therein mentioned, and that said premises were and constituted the homestead of these defendants at all of said times, and was such homestead on the 22d day of July, 1891. That at all times in the supplemental complaint named, the plaintiff has been and now is a corporation organized and existing under the laws of the United States.

III.

For a third defense to said supplemental complaint and as a counter-claim thereto, these defendants allege that at all times in the supplemental complaint mentioned, the plaintiff has been and now is a corporation duly organized and existing under the laws of the United States. That the said promissory notes described in the supplemental complaint are mere renewals of a certain promissory note for four thousand dollars, dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire and D. J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at 18 per cent per annum from date until paid; which last named note was in turn a mere renewal of four certain original promissory notes, each executed by Patrick B. McCarthy, by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of one thousand dollars and each and all bearing interest at the rate of 18 per cent per annum from said date until paid, one of said notes being due ninety days after said date, another of said notes being due six months after said date, and another of said notes being due nine months after said date, and the remaining note being due twelve months after said date. That no loan of money was ever, at any time, made by the plaintiff to the defendant, Maggie McCarthy, and that the said loan of four thousand dollars, evidenced by said note of August 7, 1888, and by said four original notes of August 22, 1887, is the only loan or advance of
558 money ever made by the plaintiff to the defendant, Patrick B. McCarthy. That at the time of the execution of said note of August 7, 1888, and said four original notes of August 22, 1887, it was corruptly and usuriously agreed between the plaintiff and the defendant, Patrick B. McCarthy, and the said other signers of said four thousand dollar note, that the plaintiff should receive and the defendant, Patrick B. McCarthy, and the other signers of said four thousand dollar note, should pay on said note a higher rate of interest than was then allowed by law, to-wit: interest at the rate of eighteen per cent per annum. And that, at the time of the execution of said four original notes, dated August 22, 1887, it was corruptly and usuriously agreed between the plaintiff and the defend-

ant Patrick B. McCarthy, that the plaintiff should receive and the defendant, Patrick B. McCarthy, should pay a higher rate of interest than was then allowed by law, to-wit: at the rate of eighteen per cent per annum. That the said five thousand dollar note, mentioned in the supplemental complaint, was a mere renewal of said four thousand dollar note, and the said four original notes dated August 22, 1887, and the consideration therefor was the said indebtedness of four thousand dollars and usurious interest in the sum of one thousand dollars, and that the said two notes mentioned in the seventh paragraph of the supplemental complaint are a mere renewal by said Patrick B. McCarthy of the said four thousand dollar note, and the consideration therefor was the said original indebtedness of four thousand dollars and usurious interest thereon in the sum of one thousand six hundred and seventy-five and 50/100 dollars; and that there was no other consideration for the said notes described in the supplemental complaint than as in this answer set out. That since the said 22d day of August, 1887, these defendants have made and caused to be made to the plaintiff, upon said original indebtedness of four thousand dollars, general payments aggregating the sum of five thousand dollars and upwards, without any direction or agreement as to the application thereof. And these were intended by these defendants as general payments upon
559 said original indebtedness, and not as payments of usurious interest or on account thereof. And these defendants further allege, that, by reason of the usurious character of the said original loan and indebtedness, the plaintiff has forfeited all the unpaid interest claimed to be due upon the said indebtedness, and had and has no right to apply the said general payments upon said usurious interest or upon account thereof; and that these defendants are entitled to have the said general payments as aforesaid applied upon the principal of the said indebtedness. That these defendants have never consented nor agreed that the said general payments should be applied upon said usurious interest. That before this action, by reason of the said general payments as aforesaid, the said indebtedness and promissory notes described in the supplemental complaint were fully paid, satisfied and discharged.

IV.

For a fourth defence to said supplemental complaint these defendants specifically deny that the plaintiff paid the taxes described in the supplemental complaint, or any part of said taxes, under the provisions of the said mortgage in the supplemental named, or to protect the alleged mortgage lien of the plaintiff, or that there is now due or owing to the plaintiff from these defendants on account of said tax payments the sum of fourteen hundred and eighty-four dollars, or any sum of money whatever. And these defendants allege the fact to be that the plaintiff paid the said alleged taxes for the purpose of securing a tax deed and tax title to the said mortgaged premises, and not for the purpose of protecting the said alleged mortgage lien of the plaintiff, and that at the time of the said alleged tax payment there was nothing due or owing to the plaintiff

from these defendants for or on account of said mortgage or notes in said supplemental complaint mentioned. And these defendants further allege that on the 30th day of June, 1898, the said plaintiff commenced an action in the above entitled court against these defendants to recover of these defendants the possession of the said mortgaged premises and the sum of one hundred and twenty-five dollars per month since the 11th day of June, 1898, as plain-
560 tiff's alleged damages for the withholding of the same. The plaintiff alleging in its complaint in said action that at all the times in said last named complaint mentioned the plaintiff was and is a corporation duly created and existing under and by virtue of the National Banking laws of the United States, and doing and transacting a general banking business at Rapid City, in the State of South Dakota. That the plaintiff is seized in fee of the following described premises and real estate situate in the County of Pennington and State of South Dakota, to-wit: Lots numbered fifteen and sixteen in block numbered eighty-five of the Original Townsite of Rapid City, South Dakota, as said lots and block appear upon the official plat of said townsite and of record in the office of the register of deeds of said Pennington County; that these defendants were and are in the possession thereof and wrongfully withhold the same from the plaintiff, and have so wrongfully withheld the possession of the premises from this plaintiff ever since the 11th day of June, 1898, and that the reasonable value of the use of said premises is the sum of one hundred and twenty-five dollars per month. That said last named action is still pending and undetermined in said court, and that said complaint in said last named action is based upon the tax payments alleged in said supplemental complaint and upon the tax deed issued therefor to the plaintiff by the treasurer of said Pennington county on or about the 11th day of June, 1898, and that ever since the issuance of the said alleged tax deed the said plaintiff has claimed to be the owner in fee of said premises. And these defendants allege that the plaintiff paid said alleged taxes and took said deed for the purpose of acquiring a tax title to said mortgaged premises and not for the purpose of protecting the said alleged mortgage lien.

Wherefore, these defendants pray that the plaintiff take nothing by this action. That these defendants be permitted to set off against said original indebtedness of four thousand dollars the amount of said general payments as aforesaid and the amount of the said payments of usurious interest made by these defendants as aforesaid; that the said notes in the complaint mentioned be adjudged
561 to be usurious, and to be fully paid, satisfied and discharged, and that these defendants recover of the plaintiff the sum of one thousand dollars and the costs and disbursements of this action, and for such other and further relief in the premises as may be just and equitable.

CHARLES W. BROWN,
EDMUND SMITH,
Attorneys for Defendants, Patrick B. McCarthy and Maggie McCarthy.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Patrick B. McCarthy, being first duly sworn, upon his oath deposes and says, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

PATRICK B. McCARTHY.

Subscribed and sworn to before me this 27th day of February, A. D. 1901.

GEO. F. SCHNEIDER,
[SEAL.] *Notary Public.*

Endorsed: "In the Circuit Court, Within and for Pennington County. The First National Bank of Rapid City, South Dakota, a corporation, Plaintiff, vs. Patrick B. McCarthy, Maggie McCarthy, et al., Defendants. Amended Separate answer of defendants Patrick B. and Maggie McCarthy, Order to show cause, and Affidavits of Charles W. Brown, Edmund Smith and Patrick B. McCarthy. Personal service by copy of the within order to show cause, Separate Answer and Affidavits is hereby admitted at Rapid City, S. D. this 28th day of February, A. D. 1901. Fowler & Whitfield, Attorneys for Plaintiff. Edmund Smith and Charles W. Brown, attorneys for answering defendants, filed Mch. 1, 1901. Wm. P. Baken, clerk. By John P. McElroy, Jr., Deputy."

562 EXHIBIT 16.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. McCARTHY, MAGGIE McCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation; and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Reply to Amended Separate Answer of Patrick B. McCarthy and Maggie McCarthy to the Supplemental Complaint Herein.

The plaintiff, as and for its reply to the affirmative defenses and counter-claims set forth and alleged in the amended separate answer

of the defendants, Patrick B. McCarthy and Maggie McCarthy, to the supplemental complaint of the plaintiff, states as follows:

First.

It admits that the plaintiff is and has been during all the times mentioned in said counter-claims, a corporation duly organized and existing under and by virtue of the laws of the United States and the defendants, Patrick B. McCarthy and Maggie McCarthy, are and during all said times have been husband and wife.

Second.

It specifically denies each and every statement, allegation and averment, contained in said second and third defenses in said amended separate answer of said defendants, Patrick B. Mc-
563 Carthy and Maggie McCarthy, which are contained in the second and third paragraphs or subdivisions of said separate answer, and in each and every other counter-claim or affirmative defense stated in said amended separate answer of said defendants, not hereinbefore expressly admitted.

Third.

And for a second defense to said counter-claim and all counter-claims mentioned and stated in said amended separate answer of the defendants, Patrick B. McCarthy and Maggie McCarthy, to the supplemental complaint herein, plaintiff alleges that the payments therein alleged to have been made or caused to be made by said defendants were not made, and said counter-claims or causes of action did not accrue within six years next preceding the commencement of this action.

Fourth.

And for a third defense to said counter-claims and to all counter-claims mentioned and stated in said amended separate answer of the defendants, Patrick B. McCarthy and Maggie McCarthy, to the supplemental complaint herein, plaintiff alleges that the payments therein alleged to have been made or caused to be made by the said defendants, were not made and said counter-claims or causes of action did not accrue, nor were any of said payments made within three years next preceding the commencement of this action.

Fifth.

And for a fourth defense to said counter-claims and to all counter-claims mentioned and stated in said amended separate answer to the supplemental complaint herein, plaintiff alleges that said payments therein alleged to have been made or caused to be made, and which are the basis of said counter-claims were not made, nor were any of said payments made or caused to be made, and said causes of action did not accrue, within two years next preceding the commencement of this action.

Wherefore, plaintiff prays judgment that the said amended
564 separate answer of said defendants hereby and said affirmative defenses and alleged counter-claims therein be dismissed upon the merits, and that plaintiff have judgment and relief as prayed in its supplemental complaint herein, and for costs.

MARTIN & MASON AND
FOWLER & WHITFIELD,
Attorneys for Plaintiff.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Herbert W. Somers, being first duly sworn deposes and says he is an officer, viz: the cashier of the plaintiff in the above entitled action; that he has read and understands the contents of the above and foregoing reply, and the same is true of his own personal knowledge except as to those matters therein stated upon information and belief, and as to these matters he believes it to be true.

HERBERT W. SOMERS.

Subscribed and sworn to before me this 4th day of March, A. D. 1901.

FRED H. WHITFIELD.
[SEAL.] *Notary Public.*

Endorsed: "In Circuit Court, Pennington County, South Dakota. First National Bank of Rapid City, So. Dak. Plaintiff vs. Patrick B. McCarthy and Maggie McCarthy, et al., Defendants. Reply to Counter-claims in Amended Separate Answer of Patrick B. McCarthy and wife to the supplemental complaint. Personal service by copy of the within reply is hereby admitted this 8th day of March A. D. 1901. Charles W. Brown Attorney for defts. McCarthy & Wife. Martin & Mason and Fowler & Whitfield Attorneys for Plaintiff. Filed March 14th, 1901. William P. Baken, Clerk of Courts, by John P. McElroy Jr., Deputy."

EXHIBIT 17.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

565 FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants.

Order.

On this day coming on regularly to be heard the motion of the answering defendants, Patrick B. McCarthy and Maggie McCarthy, for an order that certain specific questions of fact involved herein, a statement of which is annexed to said notice of motion, marked

Exhibit A, be tried by a jury: Charles W. Brown and Edmund Smith appearing for said answering defendants, and Fred H. Whitfield appearing for the plaintiff, and the court being fully advised in the premises:

It is by the court considered and ordered, that the prayer of said motion be granted and that the following specific questions of fact involved herein, being issues herein as settled and found by the court, be tried by a jury, to-wit:

I.

Was the note for $5,000.00 dated July 22, 1891, described in the second paragraph of the supplemental complaint, a renewal of the note for $1,000.00 dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire, and D. J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at eighteen per cent per annum from date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

II.

If you answer question 1, Yes, then was the said note for $1,000.00 dated August 7, 1888, a renewal of four certain original promissory notes, each executed by Patrick B. McCarthy by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of $1,000.00 and each and all bearing interest at the rate of eighteen per cent per annum from said last named date until paid, and described in the second paragraph of the amended answer to the supple-
566 mental complaint?

III.

What, if any, of payments was made by the defendants Patrick B. McCarthy and Maggie McCarthy, or either of them, as general payments upon said indebtedness, without any direction as to the application thereof?

IV.

Did the plaintiff pay the taxes in the supplemental complaint mentioned for the purpose of securing a tax deed and tax title to the mortgaged premises?

Done in open court at Rapid City, South Dakota, this 8th day of March, A. D. 1901.

By the court,

LEVI McGEE, *Judge*.

To which ruling and order of the court the plaintiff at the time duly excepted and at its request is hereby signed and allowed.

By the court,

LEVI McGEE, *Judge*.

Endorsed: "19 34. In the Circuit Court. Within and for Pennington County. The First National Bank of Rapid City, South

Dakota, a Corporation, Plaintiff, vs. Patrick B. McCarthy, Maggie McCarthy, et al., Defendants, Order Granting Motion of Answering Defendants to submit certain specific Questions of fact to a jury, Charles W. Brown and Edmund Smith Attorneys for Answering Defendants. Book 1, pages 405-406. Filed March 9, 1901, William P. Baken, Clerk of Courts by John P. McElroy, Jr., Deputy."

Exhibit 18.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

First National Bank of Rapid City, a Corporation, Plaintiff,
vs.
Patrick B. McCarthy and Maggie McCarthy et al., Defendants.

Verdict.

567 We the jury duly empanelled in the above entitled action to try certain specific questions of fact involved herein, answer said questions as follows, to-wit:

I.

Q. Was the note for $5,000.00 dated July 22, 1891, described in the second paragraph of the supplemental complaint, a renewal of the note for $4,000, dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire, and [illegible] J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at eighteen per cent per annum from date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

A. No.

II.

Q. If you answer question 1, yes, then was the said note for $4,000.00 dated August 7, 1888, a renewal of four certain original promissory notes each executed by Patrick B. McCarthy by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of $1,000.00 and each and all bearing interest at the rate of eighteen per cent per annum from said last named date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

A. No.

III.

Q. What amount, if any, of payments was made by the defendants, Patrick B. McCarthy and Maggie McCarthy, or either of them, as general payments upon the said indebtedness, without any direction as to the application thereof?

A. Not any.

IV.

Q. Did the plaintiff pay the taxes in the supplemental complaint mentioned for the purpose of securing a tax deed and tax title to the mortgaged premises?

A. No.

ETHAN ALLEN, *Foreman.*

Endorsed: "Filed March 20, 1901, William P. Baken,
568 Clerk of Courts, By John P. McElroy, Jr., Deputy.

EXHIBIT 19.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
vs.
PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants.

Notice of Intention to Vacate Verdict of Jury, &c.

Take notice that the undersigned intend to move the court to vacate and set aside the verdict of the jury upon the four special issues heretofore submitted to the jury by the order of the court, and to grant a new trial of this action so far as the said four special issues are concerned, and for such other or further relief in the premises as may be just and proper. Said motion will be based upon the affidavits of William Hall, John Hedlun, Patrick B. McCarthy, Edmund Smith and Charles W. Brown, herewith annexed and herewith served upon you, and upon the pleadings and judgment roll herein, and upon the minutes of the court, and will be urged for the following causes, materially affecting the substantial rights of these answering defendants, to-wit:

I.

Irregularity in the proceedings of the court, by which the answering defendants were prevented from having a fair trial.

II.

Irregularity in the proceedings of the jury, by which the said answering defendants were prevented from having a fair trial.

III.

Irregularity in the proceedings of the plaintiff and its counsel, by which the said answering defendants herein were pre-
569 vented from having a fair trial.

IV.

That there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice.

V.

Insufficiency of the evidence to justify the verdict, and that said verdict is against law, in the following particulars:

1. It appears by the clear preponderance of the evidence, if not also by the undisputed evidence, that on the 22d day of August, 1887, the defendant, Patrick B. McCarthy, was indebted to the plaintiff in the sum of four thousand dollars, and gave his four notes of that date, each for $1,000.00 to evidence such indebtedness, and that thereafter, on or about January 24, 1887, a new note for $4,000.00, signed by Patrick B. McCarthy, P. B. McCarthy & Co., Michael McGuire and D. J. Tighe, was given in place of said original notes, and that thereafter and on or about April 28, 1888, a new note for $4,000.00 was given by said Patrick B. McCarthy, Michael McGuire, D. J. Tighe and P. B. McCarthy & Co., in place of said note of January 24, 1888, and that thereafter, on August 7, 1888, a new note for $4,000.00 was given by said Patrick B. McCarthy, Michael McGuire, D. J. Tighe and P. B. McCarthy & Co., in place of said note of April 22, 1888, and that the said note for $4,000.00 dated August 7, 1888, was executed by the said Patrick B. McCarthy as principal and by the said McGuire and Tighe and the firm of P. B. McCarthy & Co., as sureties only, and that after the said note of August 7, 1888, became due, a new note for $5,000.00 dated May 22, 1889, was given by the said Patrick B. McCarthy, as principal and the said Michael McGuire and Maggie McCarthy as sureties, in the place of said $4,000.00 note of August 7, 1888 and that after the said note of May 22, 1889, became due, a new note for $5,000.00, dated July 22, 1891, was given in place thereof by the said
570 Patrick B. McCarthy as principal and the said Maggie McCarthy as surety, and that the said notes of January 24, 1888, April 23, 1888, and August 7, 1888, were executed by said McGuire, Tighe and the said firm of P. B. McCarthy & Co., as sureties only for said Patrick B. McCarthy, and that said Patrick B. McCarthy was at all times from the inception of the said indebtedness, the principal therein, and that said McGuire, Tighe, Maggie McCarthy and the said firm of P. B. McCarthy & Co., were sureties only, and that the said note for four thousand dollars of date August 7, 1888, was a renewal of said four original promissory notes of said Patrick B. McCarthy, dated August 22, 1887, each for $1,000.00 and that the said note for $5,000.00 dated July 22, 1891, was a renewal of said note for $4,000.00 dated August 7, 1888, and the said jury should have answered questions 1 and 2, and each of them, Yes. It also appears by the clear preponderance of the evidence if not by the undisputed evidence, that none of the said notes was given or received as payment of said four original notes of date August 22,

1887, but that all of said notes were given as renewals of or substitutes for said four original notes.

2. It appears by the undisputed evidence herein or by the clear preponderance of the evidence that general payments were made upon the said indebtedness, without any direction as to the application thereof, as follows, to-wit: By order on James Keenan for rent, $719.40; by order on M. F. Hill, $205.50; by order on Tracey & Seip, $30.00; by assignment of Franklin Judgment $500.65; and to Richard C. Lake on July 2, 1893, at Hot Springs, S. D., $50.00, amounting in all to the sum of $1,505.55;—which amounts the jury should, upon the undisputed evidence, have found as general payments upon said indebtedness without any direction as to the application thereof, in answer to interrogatory 3, submitted to the jury.

3. It appears by the clear preponderance of the evidence, that the defendant Patrick B. McCarthy, in addition to the said sum of $1,505.55 made further general payments upon the said indebtedness, without any direction as to the application thereof,
571 amounting in the aggregate to $5,690.37 which amount in addition to said sum of $1,505.55 the jury should, according to the clear preponderance of the evidence, have found as general payments upon the said indebtedness, without any direction as to the application thereof, in answer to interrogatory 3 submitted to the jury.

4. It appears by the undisputed evidence that the plaintiff paid the taxes in the supplemental complaint mentioned for the purpose of securing a tax deed and tax title to the mortgaged premises and not otherwise; that the plaintiff purchased from Pennington County an assignment of a tax sale certificate upon the mortgaged premises, gave notice of an application for a tax deed thereon; paid prior and subsequent taxes upon the mortgaged premises; took a tax deed thereto from the treasurer of Pennington county, and thereafter, and before the trial of this action, brought an action of ejection in the court against the answering defendants to recover the possession of said mortgaged premises under and by virtue of said tax deed; that the plaintiff did not pay the said taxes as mortgagee, or under the provisions of its mortgage, or for the purpose of protecting its mortgage lien; that when the plaintiff purchased said tax sale certificate as aforesaid and took the said subsequent proceedings thereon, the same was an election on its part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. And the said jury should, according to the clear preponderance of the evidence herein, have answered question No. 4, in the affirmative.

5. The answers of the jury in response to said questions 1 and 2 are contrary to the evidence, and are not sustained by the evidence, and are contrary to law, in the particulars hereinbefore specified.

6. The answer of the jury in response to question No. 3, is contrary to the evidence, and is not sustained by the evidence, and is against law, in the particulars, hereinbefore specified.

7. The answer of the jury in response to question No. 4, is contrary to the evidence, and is not sustained by the evidence, and is against law, in the particulars hereinbefore specified.

572 The verdict of the jury in answer to said questions 1 and 2, is contrary to the instructions of the court, and was rendered under a disregard or misapprehension of such instructions.

The verdict of the jury in answer to said questions 3 and 4, is contrary to the instructions of the court, and was rendered under a disregard or misapprehension of such instructions.

Dated at Rapid City, South Dakota, this 3d day of April, 1901.

CHARLES W. BROWN,
EDMUND SMITH,
Attorneys for Defendants, Patrick B. McCarthy and Maggie McCarthy.

To Messrs. Martin & Mason and Fowler & Whitfield, Plaintiff's Attorneys.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, South Dakota, a Corporation, Plaintiff,
vs.
PATRICK B. McCARTHY and MAGGIE McCARTHY, et al., Defendants.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

William Hall, being first duly sworn, upon his oath says: that affiant was one of the jurors impanelled and sworn in the above entitled action to try the four special issues submitted to the jury by order of said court. That the trial of said four questions before the jury began on Thursday, March 14, 1901, in the afternoon of that day, and was completed on Tuesday, March 19, 1901, at about three o'clock p. m., when the jury returned into court with their verdict. That affiant is and at said times was acquainted with Alex Duhamel, son of Peter Duhamel, the vice president of the plaintiff bank. That said Alex Duhamel was one of the regular jurors at this term
573 of court, and took great interest in the trial of this action, but excused for cause from the trial of the issues herein. That on Saturday, March 16, 1901, at the hour about 8:50 o'clock a. m., affiant entered the courthouse, and proceeded up stairs and before he entered the court room he heard said Alex Duhamel talking in a loud tone of voice in the court room. And when affiant opened the doors into the court room affiant saw said Alex Duhamel sitting in one of the chairs reserved for the jury near and in front of the judge's bench, and talking in a loud tone of voice to several of the jurors in this case, about the merits of this case, and particularly about the testimony given therein the day before by the defendant, Patrick B. McCarthy. At this time the jurors impanelled in this case were congregating in the court room for the morning session of the court, and several of the jurors in this case, as affiant entered the court room, at that time, were standing near said Alex Duhamel,

and talking to him within the bar railing, and most of the other jurors in this case were at that time in the court room, but outside of the bar railing, and within the hearing of said Alex Duhamel's voice, and one or two of the jurors herein were at that time in the sheriff's office adjoining the court room. At that time and place, said Alex Duhamel said to jurors, in a loud tone of voice: "McCarthy must have a mighty good memory, when he could remember the dates of the notes and their amounts in dollars and cents about eight years or more." As soon as said Duhamel saw affiant, he got up from his chair and walked towards the sheriff's office, but continued to talk in a loud tone of voice and in the same vein about said McCarthy's testimony and "his wonderful memory," but the exact words affiant cannot give further than as above set out. The said remarks of said Alex Duhamel were in a loud tone of voice and could be easily heard in all parts of the court room and were also made in a sneering and laughing way, and the said Alex Duhamel laughed heartily at his own remarks, and many in the court room, including jurors in this case, joined in such laughter. And all such laughter, sneering and remarks seemed to be at the expense of the defendant, Patrick B. McCarthy, the said Alex Duhamel
574 sneeringly insinuating that the testimony of said Patrick B. McCarthy, as given in this case, was false and improbable. When said Alex Duhamel arose and went to the sheriff's office as above stated, he continued, after he got into the sheriff's office, to talk in a loud tone of voice, and several of the jurors in this case followed him into the sheriff's office and listened to his talk there, but affiant could not hear the exact words he said while in the sheriff's office, and said Alex Duhamel and others continued to talk in the sheriff's office until a few moments before the judge came in and opened court that morning. That affiant has no interest whatever in the result of this action.

WILLIAM HALL.

Subscribed and sworn to before me this 28th day of March, A. D. 1901.

CHARLES W. BROWN,
[SEAL.] *Notary Public.*

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
vs.
PATRICK B. McCARTHY and MAGGIE McCARTHY et al., defendants.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

John Hellun, being first duly sworn, upon his oath deposes and says, that he was one of the jurors impanelled and sworn in the

above entitled action, to try the four special issues herein, and has read the foregoing affidavit of William Hall, verified herein on March 26, 1901, before Charles W. Brown, notary public; said William Hall having been a fellow-juror with affiant in said case. That on Saturday, March 16, 1901, at the hour of about 8:50 o'clock a. m. the time mentioned in the said affidavit of said William Hall, affiant was present in the court room of the said court house, and heard the said remarks of said Alex Duhamel, mentioned and described
575 in the said affidavit of said William Hall. And affiant further says that the said Alex Duhamel made the said remarks in the presence and hearing of the jurors herein, as stated in the said affidavit of the said William Hall, and that the said affidavit of the said William Hall, so far as the same relates to or states what was said and done by said Alex Duhamel at said time and place, is true and correct and that the said words, manner and tone of voice of said Alex Duhamel were as stated in the said affidavit of said William Hall. Affiant further says that the court instructed the jury herein at about nine o'clock in the morning of Tuesday, March 19, 1901, after which charge the jury retired to consider their verdict. That the bailiffs took the jury to dinner at Henderson's restaurant, adjoining the saloon of Peter Sweeney on the north side of Main street in Rapid City, at about noon of said Tuesday, March 19, 1901, and that after the jury had their dinner and came out of said restaurant, they started to go east on said Main street, to go back to the court house, but just then said Peter Sweeney came out on the sidewalk and treated the jurors to cigars, whereupon one—the *the* bailiffs directed the jurors to go westerly on Main street to Seventh street, and thence south on Seventh street, past the First National Bank to St. Joe street, and the postoffice, and thence back to the court house. Affiant further says that the jurors on said March 19, 1901, on their way back from the restaurant to the court house, stopped at the postoffice in Rapid City, and nine of said jurors went into said postoffice to get mail or to inquire for mail.

JOHN HEDUN.

Subscribed and sworn to before me this 28th day of March, A. D. 1901.

[SEAL.] CHARLES W. BROWN,
Notary Public.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
vs.
PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., defendants.

576 STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Patrick B. McCarthy, Edmund Smith and Charles W. Brown, being first severally duly sworn, each for himself and not one for the other, upon his oath says: That Patrick B. McCarthy is one of

the answering defendants herein, and said Charles W. Brown and Edmund Smith are attorneys for the answering defendants herein. That affiant was present at the trial of the four special issues submitted to the jury herein. That the trial of said four questions before the jury, began on the 14th day of March, 1901, in the afternoon of that day, and was completed on Tuesday, March 19, 1901, at about three o'clock p. m., when the jury returned into court with their verdict. That affiant has for a long time been acquainted with Peter Duhamel, the vice president of the plaintiff bank, and with his son Alex Duhamel. That said Alex Duhamel was one of the regular jurors at this term of court, and took great interest in the trial of this action, but was excused for cause from this trial of the issues herein, the cause being that he was the son of said Peter Duhamel, vice president and one of the directors of the plaintiff and a heavy stockholder therein. That said Peter Duhamel also took great interest in the trial of this case, and both said Peter Duhamel and said Alex Duhamel were present during almost the entire time of said trial. That said Peter Duhamel is one of the wealthiest men, if not the wealthiest man, in said Pennington county, being generally rated as being worth a quarter of a million of dollars and upwards, and is, on account of his great wealth, a man of great influence in said county, and that said Alex Duhamel, by reason of the wealth of his father and his own wealth, is also a man of great influence in said county. That the said Peter Duhamel has for many years been a leading stockman of said Pennington county, and possessed of great wealth, and connected with the said plaintiff bank, the leading monied institution of the county. That affiant was present during the entire time of the argument of this issue to the jury, and heard the argument of Fred H. Whitfield, one
577 of the plaintiff's counsel. That in his argument to the jury the said Whitfield, against the objections of the answering defendants, made many misstatements of the evidence herein, and appealed to the passion and prejudice of the jurors, and to the friendship of some of them for him, to the great prejudice of the defendants. That during said argument the said Whitfield, against the objection of the answering defendants, said among other things, that the defendant, Patrick B. McCarthy, was impeached by his own counsel, meaning Charles W. Brown, one of defendant's counsel. Whereas, in truth and in fact, the said Patrick B. McCarthy, was not impeached by his said counsel, and there was no inconsistency or conflict whatever between the testimony of the said Patrick B. McCarthy and his said counsel. That in said argument, the said Whitfield, against the objection of the answering defendants, stated, among other things, that the defendant, Patrick B. McCarthy, testified that the $50.00 paid by him to Richard C. Lake, at Hot Springs on July 8, 1893, was a payment upon interest. Whereas in truth and in fact, the said Patrick B. McCarthy did not so testify; but did testify that the said $50.00 was a general payment without any direction as to its application. That in his said argument to the jury, against the objection of the answering defendants, the said Whitfield further said, among other things, that the said Michael

McGuire testified that the note for $4,000.00 of January 24, 1888, was given by the said Michael McGuire and D. J. Tighe as principal and by the said McCarthy as surety. Whereas in truth and in fact, the said McGuire did not so testify but did testify that the said $4,000.00 note of January 24, 1888, was a renewal of the indebtedness of said Patrick B. McCarthy, with said McGuire and Tighe as additional signers. That during his said argument, against the objection of the answering defendants, the said Whitfield, among other things, further said to the jury, that it has been insinuated on the public streets of Rapid City that the plaintiff bank could get no verdict in this case, and that the jurors, or some of them, were prejudiced against monied institutions and would be against paying even the principal involved in this case; but that he, the said
578 Whitfield, had resented such insinuations for the reason that some of the jurors in this case were among the best friends he had in this county. That in his said argument to the jury, against the objections of the answering defendants, the said Whitfield, among other things, further stated that the answering defendants in this case not only claimed that there was nothing due upon the notes sued on, but that they, the said answering defendants, had overpaid the said notes and demanded a judgment against the plaintiff bank for three thousand dollars. Whereas in truth and in fact, the said answering defendants neither in their answer herein, nor by argument of counsel, nor in any other way, claimed to the jury or to the court that the said answering defendants demanded or were entitled to a judgment for three thousand dollars, or any other sum, against the plaintiff bank. That at the time the above statements were made by the said Whitfield, and the exceptions and objections taken thereto by the said answering defendants, the said Fred H. Whitfield refused to correct the mis-statements, or objectionable statements or to withdraw the same; but insisted that they were correct and persisted therein in his further argument to the jury, notwithstanding the objections of said answering defendants. That during the argument of this case, James R. Sharp, the official ste-ographer of the court, was ill and was not present in the court room, nor was any other stenographer present or appointed to take his place. That by reason of the absence of said stenographer, the court stated in open court that the objections and exceptions made and taken by the said answering defendants to the said objectionable remarks and argument of the said plaintiff's counsel, would be allowed by the court the same as though they had been taken down by the said stenographer and made a part of the bill of exceptions herein.

PATRICK B. McCARTHY.
EDMUND SMITH.
CHARLES W. BROWN.

Subscribed and sworn to before me this 3d day of April, A. D. 1901.

[SEAL.]

ROY D. FRANK,
Notary Public.

579 Endorsed: "In the Circuit Court, within and for Pennington County. First National Bank of Rapid City, South Dakota, a corporation, plaintiff, vs. Patrick B. McCarthy et al., Defendants. Notice to vacate verdict of jury and annexed affidavits. Personal service by copy of the within is hereby admitted at Rapid City, South Dakota, this 3d day of April, A. D. 1901. Martin & Mason, Fowler & Whitfield, Attorneys for Plaintiff. Charles W. Brown and Edmund Smith, Attorneys for Defendants. Filed Sept. 24, 1901. William P. Baken, Clerk of Courts."

EXHIBIT 20.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota, within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
versus
PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson, Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Order Denying Motion of Defendants to Vacate and Set Aside the Verdict of the Jury and for a New Trial of the Four Special Issues Herein.

This matter coming on to be heard upon the motion of the defendants Patrick B. McCarthy and Maggie McCarthy, the said defendants appearing in person and by Edmund Smith, Esq., and Charles W. Brown, Esq., their attorneys, in support thereof, and the plaintiff appearing by its attorneys Norman T. Mason and Fred H. Whitfield in resistance thereto; and the defendants having
580 introduced the affidavits of William Hall verified March 26, 1901, before Charles W. Brown, a notary public, and of John Hedlun, verified March 28, 1901, before Charles W. Brown a notary public, and of Patrick B. McCarthy, Edmund Smith and Charles W. Brown jointly, verified April 3, 1901, before Roy D. Frank, a notary public, in support of said *mo*Carthy, verified April 30, 1901, in rebuttal; and the plaintiff having interposed in resistance thereto the affidavits of James Halley, Peter Duhamel, Herbert Somers, J. H. Gale and Asher K. Thomas, verified April 6th, 1901, before Fred H. Whitfield, a notary public, and of James Halley, John J. McNamara, Peter Duhamel and Eugene Holcomb, on April 6, 1901, before Fred H. Whitfield, a notary public; and of

John P. Smith and Fred D. Lake, verified on April 8th, 1901, before Fred H. Whitfield, a notary public; and of Peter Sweeney, verified April 6, 1901, before Fred H. Whitfield, a notary public and of Alex Duhamel, verified April 8th, 1901, before Fred H. Whitfield, a notary public, and of G. S. Avant, D. Wyrick, Ethan Allen, Joseph Poor, G. M. Redfern, J. A. Eggleston, J. S. Getchell, Chas. Rayborne and Frizt Heldt verified April 6th, 1901, before Fred H. Whitfield, a notary public; and of John Hedlun, verified April 8th, 1901, before C. J. Patton, a notary public, of Fred H. Whitfield, verified April 6th, 1901, before A. Z. Wells, a notary public; of Herbert W. Somers and A. W. Bangs, verified April 8th and 9th, respectively, 1901, each before Fred H. Whitfield, and the defendant's notice of intention to vacate the verdict of the jury, dated April 3, 1901, and heretofore served; and the court having read the said affidavits and considered the same, and having heard the argument of counsel and having considered the same, and being fully informed in the premises; it is ordered that said motion to vacate and set aside the verdict of the jury upon the four special issues submitted to the jury by order of the court, and to grant a new trial of this action so far as the said four special issues are concerned be, and the same is in all things denied, refused and overruled.

Done in open court at Rapid City, So. Dak., this May 18th,
581 A. D. 1901.

By the Court:

LEVI McGEE, *Judge.*

Attest:

——— ———.

To which order the answering defendants at the time duly excepted and at their request this exception is allowed.

LEVI McGEE, *Judge.*

Endorsed: "In Circuit Court, Pennington County, So. Dak. First National Bank of Rapid City, S. D., Plaintiff, vs. Patrick B. McCarthy, et al., Defendants. Order denying defendants' motion to vacate the verdict of the jury and for a new trial on the four special issues submitted to the jury. Martin & Mason and Fowler & Whitfield, Attorneys for Plaintiff. Filed May 25, 1901. William P. Baken, Clerk of Courts."

Exhibit 21.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff,

versus

Patrick B. McCarthy, Maggie McCarthy, Milton Frease, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation; and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

582 *Decision.*

This cause coming on regularly for trial at the regular March, A. D. 1901, term of said court, and being tried by said court and a jury upon certain specific questions submitted for the determination of a jury upon the motion of the defendants, upon the regular call of the calendar, on the 14th, 15th, 16th, 18th, and 19th and 20th days of March, A. D. 1901; the plaintiff appearing by its attorneys, Martin & Mason, and Fowler & Whitfield, and the defendants, Patrick B. McCarthy and Maggie McCarthy appearing in person and by their attorneys, Charles W. Brown, Esq., and Edmund Smith, Esq., the other defendants not appearing either in person or by attorney; and said jury having duly found and returned a verdict and answers to the specific questions submitted to it, which verdict has been heretofore filed and entered in this court and the court having heard the evidence adduced and having considered the same; and having adopted the findings and verdict of the jury, and having heard the argument of counsel, and being fully advised in the premises, and having announced its decision in favor of the plaintiff and against the defendants, Patrick B. McCarthy and Maggie McCarthy, on all the issues in said cause, now makes and files the following findings of fact and conclusions of law, to-wit:

Findings of Fact.

I. That the plaintiff, the First National Bank of Rapid City, South Dakota, is a banking corporation duly organized and existing under and by virtue of the laws of the United States, and having its principal place of business at Rapid City, South Dakota.

II. That on the 22d day of July, A. D. 1891, at Rapid City, South Dakota, the defendants, Patrick B. McCarthy (in and by the name

of P. B. McCarthy) and Maggie McCarthy, for value received, duly made, executed and delivered to the plaintiff, their certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, in six months after said date the sum of five thousand dollars, with interest thereon at the rate of 12 per cent per annum from date until paid.

583 III. That to secure the payment of the principal and the interest mentioned in said principal note, said defendants, Patrick B. McCarthy and Maggie McCarthy, did, at the same time, execute under their hands, duly acknowledge and deliver to the plaintiff their certain mortgage bearing even date with said note, the acknowledgment of the execution of said mortgage bearing date the 24th day of July, 1891, whereby said defendants duly mortgaged to the plaintiff, in fee, certain lands real estate situate in the County of Pennington and State of South Dakota, described in said mortgage as follows, to-wit:

Lots numbered fifteen (15) and sixteen (16) of block numbered eighty-five (85) of the original townsite of Rapid City, Pennington county, State of South Dakota, as shown on the official plat of said Rapid City, South Dakota, on file in the office of the register of deeds of Pennington county, South Dakota, together with all hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Which said mortgage contained a condition for the payment of said sum of five thousand dollars with interest at the rate, at the time and in the manner specified in said note, and according to the conditions of said note which is described in the foregoing Finding of Fact No. II herein.

IV. That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards duly recorded in the office of the register of deeds of said county and state on the 10th day of October, 1891, at 3:30 p. m. of that day in book "17" page 14 of the Mortgage Records of said county and state.

V. That the said defendants, Patrick B. McCarthy and Maggie McCarthy, covenanted in said mortgage that in case of the foreclosure or commencement of the foreclosure of said mortgage they would pay the statutory attorney's fees in addition to the taxable costs of foreclosure suit. That no loan of money was ever made by said plaintiff bank to the defendant Maggie McCarthy.

VI. That the defendants, Patrick B. McCarthy and Maggie McCarthy, have failed to comply with the terms of said promissory note and said mortgage by failing and omitting to pay said

584 principal sum of five thousand dollars mentioned in said note, which became due and payable January 22, 1892, or any part thereof; that no part of said promissory note of five thousand dollars was ever paid except that between February 7, 1892, and February 17, 1896, interest payments were made thereon amounting in the aggregate to the sum of $2,067.74; leaving due and unpaid on said promissory note on said February 17, 1896, the sum of five thousand six hundred seventy-five dollars and fifty cents. That on said February 17, 1896, the plaintiff had a settle-

ment or statement of account with the defendants, Patrick B. McCarthy and Maggie McCarthy, on account of said last mentioned note and mortgage at which date and on which accounting there was found to be due to the plaintiff from said defendants the sum of five thousand six hundred and seventy-five dollars and fifty cents; and at said date said defendants, Patrick B. McCarthy and Maggie McCarthy, as renewal of said promissory note set forth in the second finding of fact above, duly made, executed and delivered to the plaintiff as evidence of said sum then found to be due, their two certain promissory notes in writing, dated on that date, one of said notes being for the sum of $5,000 due and payable in four months after said date, with interest at the rate of twelve per cent per annum from said date until paid; and the other of said notes being for the sum of $675.50, and being due and payable in thirty days after said date with interest at the rate of 12 per cent per annum from date until paid.

VII. That said sum of five thousand six hundred seventy-five dollars and fifty cents has not been paid, nor has any part thereof been paid except the sum of thirty dollars, which was paid as interest thereon on July 1, 1896; and the sum of fifty dollars, which was paid as interest thereon on November 23, 1896; that the plaintiff is now the owner and holder of said two promissory notes last above mentioned and of said mortgage, and there is now due and owing to the plaintiff, The First National Bank of Rapid City, South Dakota, from the defendants, Patrick B. McCarthy and Maggie McCarthy on account of said last two notes and said mortgage,
585 the sum of five thousand six hundred seventy-five dollars and fifty cents with interest thereon at the rate of twelve per cent per annum from April 1, 1896; besides the additional sum of twenty-five dollars, the statutory attorney's fees of this action as stipulated for in said mortgage.

VIII. That no action or proceedings at law or otherwise has been had to recover the sum so secured by said notes and mortgage or any part thereof, except that a tax deed was issued to the plaintiff for the taxes upon said mortgaged premises for the year 1896 and an action was commenced for the possession under said tax deed, but that said action has been dismissed and is not now being prosecuted.

IX. That the rights, titles, claims or interests of the defendants Milton Frease; Charles L. Ward; The Hamburger Company, a corporation; the Mathushek Piano Manufacturing Company, a corporation; Charles W. Johnson, trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen and Adolph Karpen, co-partners as S. Karpen & Brothers; Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Thomas C. Blair; Albert Amsbury; John J. Fayel; The Omaha National Bank, a corporation, and Pennington County, a public corporation of the State of South Dakota, and of each and all of said last named defendants are junior, inferior and subsequent to the lien of the plaintiff upon the mortgaged premises hereinbefore described, and each and every part thereof.

X. That the defendants, Patrick B. McCarthy and Maggie Mc-

Carthy, further failed to comply with the terms of said promissory notes dated February 17, 1896, and of said mortgage, by failing and neglecting to pay the taxes legally assessed upon said mortgaged premises for the years 1890 and 1899 both inclusive; and that heretofore and on March 23, 1898, the plaintiff paid the taxes so assessed and delinquent and unpaid upon said premises for the purpose of protecting its mortgaged security therein for the year 1890, in the sum of $174.20; for the year 1891, in the sum of $189.20; for the year 1892, in the sum of $208.11; for the year 1893, in the sum of $157.00; for the year 1894, in the sum of $141.71; for the year 1895, in the sum of $133.47; for the year 1896, in the sum
586 of $151.13; and for the year 1897, in the sum of $142.18; and that on May 26, 1899, the plaintiff also paid the taxes on said mortgaged premises for the purpose of protecting its mortgage security therein, in the sum of $99.73 for the year 1898; and on February 16, 1900, in the sum of $43.64 for the first half of the taxes thereon for the year 1899; and on September 19, 1900, plaintiff likewise paid $43.63 for the last half of the taxes on said mortgaged premises for the year 1899, all of which payments were made for the purpose of protecting the plaintiff's mortgage security.

XI. That upon the application of the defendants, Patrick B. McCarthy and Maggie McCarthy, the following specific questions of fact were by an order of this court duly submitted to a jury for determination, and the same were duly tried by said jury at the trial above mentioned, and their verdict thereon was as follows, to-wit:

Question No. 1. Was the note for $5,000 dated July 22, 1891, described in the second paragraph of the supplemental complaint, a renewal of the note for $4,000 dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire and D. J. Tighe, and payable to the order of the plaintiff, ninety days after said date, with interest thereon at eighteen per cent per annum from date until paid, and described in the second paragraph of the separate amended answer to the supplemental complaint?

To which question No. 1 the jury answered, "No."

Question No. 2. If you answer question No. 1 "Yes" then was the said note for $4,000 dated August 7, 1888, a renewal of four certain original promissory notes, each executed by Patrick B. McCarthy, by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of one thousand dollars, and each and all bearing interest at the rate of eighteen per cent per annum from said last named date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

587 To which question No. 2 the jury answered, "No."

Question No. 3. What amount, if any, of payments was made by the defendants, Patrick B. McCarthy and Maggie McCarthy, or either of them, as general payments upon the said indebtedness, without any direction as to the application thereof?

To which question No. 3 the jury answered "No."

Question No. 4. Did the plaintiff pay the taxes in the supplemental complaint mentioned for the purpose of securing a tax deed and tax title to the mortgaged premises?

To which question No. 4 the jury answered "not any."

Which said verdict of the jury in the form of the said questions and answers thereto, was duly returned into court and filed March 20, 1901, and entered in the records of said court in this cause. That the court hereby approves said verdict and findings of the jury therein, and adopts the same and hereby embodies the same in these findings of the court as finding of fact No. XI.

XII. That the notes for $5,000 and $675.50, each dated February 17, 1896, and which are particularly described in the above finding of fact No. VI., were given by the defendants Patrick B. McCarthy and Maggie McCarthy and were received by the plaintiff bank as renewals of the note of the defendants, Patrick B. McCarthy and Maggie McCarthy, dated July 22, 1891, for $5,000, which is particularly described in the above finding of fact No. II, and for the same indebtedness. That said note of July 22, 1891, for the sum of $5,000, executed and delivered by the defendants, Patrick B. McCarthy and Maggie McCarthy, to the plaintiff, The First National Bank of Rapid City, South Dakota, was so made, executed and delivered by said defendants, and was received by said plaintiff, as a new and original indebtedness and obligation, and not as a renewal or continuation of any prior existing indebtedness or obligation of the said defendants, Patrick B. McCarthy or Maggie McCarthy, or either of them or any other person, firm or corporation.

588 XIII. The court finds in favor of the plaintiff and against the defendants, Patrick B. McCarthy and Maggie McCarthy, upon all the issues.

Conclusions of Law.

I. That the plaintiff is entitled to judgment against the defendants, Patrick B. McCarthy and Maggie McCarthy, for the sum of five thousand six hundred seventy-five and 50-100 dollars, with interest thereon at the rate of twelve per cent per annum, from April 1, 1896, together with the sum of $1,484.01, on account of the taxes paid by the plaintiff upon the mortgaged premises, with interest on the sum of $43.63 thereof from February 16, 1900, and on $43.64 thereof from September 19, 1900; and on $99.73 thereof from May 26, 1899; and on $1,297 thereof from March 23, 1898, all at the rate of twelve per cent per annum, besides the costs of this action, and the additional sum of $25 attorney's fees stipulated for in said mortgage.

II. That the defendants in this action and all persons claiming or to claim under them or either of them subsequent to this action, be forever barred and foreclosed of all right, title, claim, interest or equity of redemption of, in or to said mortgaged premises or any part thereof.

III. That said mortgaged premises above mentioned may be decreed to be sold according to law, and that out of the proceeds arising from such sale the plaintiff be paid the amount found to be due as aforesaid, with interest to the time of such payment, and the costs and expenses of such sale, together with the attorney's fees as aforesaid, so far as the amount of such monies properly applicable thereto

will pay the same; and that the defendants, Patrick B. McCarthy and Maggie McCarthy, be adjudged to pay any deficiency which may remain after applying all the monies so applicable thereto. Let the judgment and decree of this court be entered accordingly.

Done in open court this 23d day of March, A. D. 1901.

By the court,

LEVI McGEE, *Judge.*

Attest:

WILLIAM BAKEN, *Clerk.*

589 By JOHN P. McELROY, Jr.,
Deputy Clerk.

Filed May 18, 1901. Entered Judgment Book 9, page 346.

Exhibit 22.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff,

versus

Patrick B. McCarthy, Maggie McCarthy, Milton Frease, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Judgment.

This cause coming on regularly for trial upon the call of the calendar of the regular March, A. D. 1901 term of the above named court, and being tried by said court and a jury upon certain specific questions of fact submitted to said jury for its determination upon the application of the defendants, said trial beginning on the 14th day of March, 1901, and closing on the 20th day of March, 1901; the plaintiff appearing by its attorneys, Martin & Mason and Fowler & Whitfield; and the defendants, Patrick B. McCarthy and Maggie McCarthy, appearing in person and by their attorneys, Charles W. Brown, Esq., and Edmund Smith, Esq., the other defendants not appearing in person or by attorneys, and said jury having duly found and returned into court their verdict and findings upon all the issues submitted to it, and said verdict having been filed and entered herein; and the court having duly approved said

590 verdict of the jury and having made and filed its findings of fact and conclusions of law in writing, embracing said verdict

and findings of the jury; and it appearing satisfactorily to the court by proper proof that the summons, verified complaint and notice of no personal claim in this action have been duly and personally served upon each and all the defendants, more than thirty days before the trial of said cause; and it further in like manner appearing that no appearance has been made by said defendants or any of them in person or by attorney, and that no answer or demurrer to said complaint or copy of either had been served upon or received by the plaintiff's attorneys except that the defendants, Patrick B. McCarthy and Maggie McCarthy, appeared as hereinafter stated and joined issue with plaintiff; and the defendants, Milton Frease, Charles L. Ward, The Midland State Bank, a corporation; Solomon Karpen Oscar Karpen and Adolph Karpen, copartners as S. Karpen & Brothers, Thomas C. Blair, Albert Amsbury and The Omaha National Bank, and each of them appeared and interposed their separate answer to the complaint, wherein said last named defendants disclaimed any right, title or interest in or to the mortgaged premises mentioned in the complaint and hereinafter described, or to any part thereof, superior to the mortgage lien of the plaintiff herein; and except also that said defendants, Pennington county, a corporation, The Hamburger Company, a public corporation, and the Mathushek Piano Co., a corporation, appeared by their respective attorneys more than thirty days before the trial hereof and demanded a copy of the complaint herein, which complaint was duly served upon and received by the attorneys for said last named defendants, but that no answer or demurrer or copy of either on behalf of either of said last named defendants has been served upon or received by plaintiff's attorneys, and more than thirty days have elapsed since the service of the complaint upon said defendants last above named.

And this cause coming on to be tried as aforesaid, upon the supplemental complaint of the plaintiff, the amended separate answer of the defendants Patrick B. McCarthy and Maggie McCar-
591 thy to said supplemental complaint, and plaintiff's reply thereto; and the proofs adduced. And the court having heard the evidence and having considered the same, and having heard the argument of counsel and being fully advised in the premises, and having adopted the findings and verdict of the jury, and having heretofore announced its decision in favor of the plaintiff and against the defendants upon all the issues, and having caused its written findings of fact and conclusions of law in writing to be filed and entered herein; now upon motion of Martin & Mason, and Fowler & Whitfield, attorneys for the plaintiff;

It is by the court ordered and adjudged that the plaintiff, the First National Bank of Rapid City, South Dakota, have and recover of and from the defendants, Patrick B. McCarthy, as principal debtor, and Maggie McCarthy as surety, the sum of five thousand six hundred and seventy-five and 50-100 dollars principal, with interest thereon from April 1, 1896, at the rate of twelve per cent per annum; also the sum of fourteen hundred twenty-one and 51-100 dollars on account of taxes paid by the said plaintiff upon the mort-

gaged premises, less sixty-two and 50-100 dollars, being the excess paid above what said taxes could actually have been paid and discharged for, with interest on forty-three and 63-100 ($43.63) dollars thereof from September 19, 1900; on forty-three and 64-100 ($43.64) dollars thereon from February 16, 1900; on ninety-nine and 73-100 ($99.73) dollars thereof from May 26, 1899; and on twelve hundred thirty-four and 50-100 ($1,234.50) dollars thereof from March 23, 1898, all at the rate of twelve per cent per annum; and amounting at this date for said principal and interest thereon, and for said taxes and interest thereon, to the total sum of eleven thousand and one hundred seven and 85-100 ($11,107.85) dollars as damages on account of said mortgaged indebtedness mentioned in the complaint, together with the costs of this action at the sum of $113.45 to be taxed and inserted herein by the clerk of this court, and amounting in all for said damages and costs, to the total sum of eleven thousand two hundred twenty-one and 30-100 ($11,221.30) dollars.

592 It is further by the court ordered, adjudged and decreed that the mortgaged premises described in the complaint in this action, and hereinafter described, or so much thereof as may be sufficient to raise the amount so found and adjudged to be due the plaintiff for principal, interest, taxes paid and interest thereon and the costs of this action and costs of sale, and which may be sold separately without material injury to the parties interested, be sold by public auction at the front door of the court house in the City of Rapid City, in said Pennington county, South Dakota, upon the like notice and in the same manner as provided by law for the sale of real property upon execution by or under the direction of the sheriff of said Pennington county. That said sheriff give public notice of the time and place of such sale by the publication of the same for thirty days, at least once in each week, in some newspaper published and of general circulation in said county, at least thirty days before the day of sale. That the plaintiff or any other party to this action may become a purchaser on such sale. That the said sheriff execute and deliver to the purchaser or purchasers, a certificate of such sale, and upon the confirmation of the report thereof and the expiration of the time allowed by law for redemption of said premises therefrom, if said premises are not then redeemed, that said sheriff or his successor in office, make to the purchaser or purchasers, and deliver a deed or deeds of the premises sold. That out of the proceeds of the sale, after deducting the amount of his fees and the expenses of such sale, and any prior lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, he pay to the plaintiff, or to Fowler & Whitfield, its attorneys, the sum of eleven thousand, one hundred seventy and 85-100 dollars, together with the costs as taxed and inserted herein, adjudged to the plaintiff for damages and costs in this action, together with interest thereon from this date, or so much thereof as the purchase money of the mortgaged premises will pay of the same, and that he take a receipt of the plaintiff, or of Fowler & Whitfield, its attorneys, for the amount so paid, and file the same with his report of sale. That the said sheriff pay the sur-

plus monies arising from such sale, if any, to the clerk of
593 this court, and that he make a report of such sale and his doings in the premises, and file the same with the clerk of this court with all convenient speed, and that the purchaser or purchasers at such sale be let into possession of the premises on production of the deed and a certified copy of the order confirming the report thereof.

And it is further ordered, adjudged and decreed by the court, that if the proceeds of such sale be insufficient to pay the amount so adjudged to be due to the plaintiff, with the interest and costs and expenses as aforesaid, the sheriff shall specify the amount of such deficiency in his report of sale, and that the said defendants, Patrick B. McCarthy, as principal debtor, and Maggie McCarthy, as surety, pay the same to the plaintiff, with interest from the day of sale; and that the plaintiff have execution therefor against the property of the said defendants, Patrick B. McCarthy, as the principal debtor, and against Maggie McCarthy, as surety debtor.

And it is further ordered, adjudged and decreed by the court, that the *re*fendants, and all persons claiming under them or either of them since the commencement of this action, and since the filing of the complaint herein, be forever barred and foreclosed of all right, title and interest and equity of redemption in and to said mortgaged premises so sold, or any part thereof, unless the same shall be duly redeemed within the time allowed by law for such redemption.

The following is a description and the particular boundaries of the mortgaged premises to be sold, as hereinbefore directed, to-wit:

Lots numbered fifteen (15) and sixteen (16), in block numbered eighty-five (85) of the original townsite of Rapid City, in Pennington county, South Dakota, as shown on the official plat of said Rapid City, South Dakota, on file in the office of the register of deeds of Pennington county, South Dakota, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Done in open court, at Rapid City, Pennington county, South Dakota, this 18th day of May, A. D. 1901.

By the court,

LEVI McGEE, *Judge*.

Attest:

WILLIAM P. BAKEN, *Clerk*.

594 By JOHN P. McELROY, Jr., *Deputy*.

EXHIBIT 23.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
vs.
PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants.

Notice of Intention to Move for New Trial.

Take notice, that the undersigned, the answering defendants herein, intend to move the court to vacate and set aside the verdict and decision herein, and the judgment rendered thereon, and to grant a new trial of this action, for the following causes, materially affecting the substantial rights of these defendants:

1. Irregularity in the proceedings of the court, by which these defendants were prevented from having a fair trial.
2. Irregularity in the proceedings of the jury, by which these defendants were prevented from having a fair trial.
3. Irregularity in the proceedings of the plaintiff and its counsel, by which these defendants were prevented from having a fair trial.
4. Newly discovered evidence material to these defendants, which they could not, with reasonable diligence, have discovered and produced at the trial.
5. Excessive damages appearing to have been given under the influence of passion or prejudice.
6. Insufficiency of the evidence to justify the verdict and decision, and that said verdict and decision are against law.
7. Error in law, occurring at the trial, and excepted to by these defendants.

Said motion will be made upon a bill of exceptions hereafter to be prepared, served and filed, and upon affidavits hereafter to be served and filed, and upon the pleadings and judgment roll herein.

Dated at Rapid City, South Dakota, this 14th day of
595 June, A. D. 1901.

CHARLES W. BROWN,
EDMUND SMITH,
Attorneys for Defendants, Patrick B. McCarthy, and Maggie McCarthy.

To Messrs. Martin & Mason, and Fowler & Whitfield, Attorneys for Plaintiff.

Exhibit 24.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

First National Bank of Rapid City, South Dakota, a Corporation, Plaintiff,

vs.

Patrick B. McCarthy and Maggie McCarthy et al., Defendants.

Bill of Exceptions.

Be it remembered that the issues joined in this action by the amended and supplemental complaint of the plaintiff, the amended separated answer thereto of the defendants, Patrick B. McCarthy and Maggie McCarthy, and the plaintiff's reply to said separate answer, came on for trial at the regular March, A. D. 1901, term of said court. And thereupon the court made the following order:

"On this day coming on regularly to be heard the motion of the answering defendants, Patrick B. McCarthy and Maggie McCarthy, for an order that certain specific questions of fact involved herein, a statement of which is annexed to said notice of motion, marked Exhibit A, be tried by a jury; Charles W. Brown and Edmund Smith appearing for said answering defendants, and Fred H Whitfield appearing for the plaintiff, and the court being fully advised in the premises:

It is by the court considered and ordered, that the prayer of said motion be granted, and that the following specific questions of fact involved herein, being issues herein as settled and found by the court, be tried by a jury, to-wit:

I.

596 Was the note of $5,000.00, dated July 22, 1891, described in the second paragraph of the supplemental complaint, a renewal of the note for $4,000.00, dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire and D. J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at eighteen per cent per annum from date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

II.

If you answer Question I, Yes, then was the said note for $4,000.00, dated August 7, 1888, a renewal of four certain original promissory notes, each executed by Patrick B. McCarthy, by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of $1,000.00, and each and all bearing interest at the rate of eighteen per cent per annum from said last named date until paid, and described in the second paragraph of the amended answer to the supplemental complaint?

III.

What amount, if any, of payments, was made by the defendants, Patrick B. McCarthy and Maggie McCarthy or either of them, as general payments upon the said indebtedness without any direction as to the application thereof?

IV.

Did the plaintiff pay the taxes in the supplemental complaint mentioned for the purpose of securing a tax deed and tax title to the mortgaged premises?

Done in open court at Rapid City, South Dakota, this 8th day of March, A. D. 1901.

By the court:

LEVI McGEE, *Judge.*

And thereupon, in the said month of March, A. D. 1901, and at the said term of court, a jury was impanelled and said four specific questions of fact were submitted to the jury; and the said action was tried upon all issues made by the said pleadings, as well as upon the said four specific questions of fact submitted to the jury. And at the said trial the following evidence was introduced, and the following proceedings were had:

597 The plaintiff, to maintain the issues on its part, produced and examined the following witnesses, and offered the following evidence:

JAMES HALLEY, sworn as a witness on behalf of the plaintiff, testified as follows:

I reside at Rapid City, South Dakota; my business is banking; I am president of the plaintiff and have been for several years. Prior to that time I was cashier; have been connected with the plaintiff since its organization, and prior to that time was acquainted with the business of the bank in its dealings with its patrons. As president and cashier of the bank, I was familiar with the dealings had with Mr. McCarthy mentioned in the complaint. This paper, Exhibit A, I know to be one of the papers of the plaintiff bank; it is a note of P. B. McCarthy and Maggie McCarthy for $5,000, payable to the First National Bank, dated December 22, 1891; it is signed by P. B. McCarthy and Maggie McCarthy. There is a long list of payments made on the back of the note and endorsed. I know personally of the endorsements of the payments; every one is made by me in my handwriting; the date is set opposite every payment on the note. There were no other payments whatever than those endorsed there on that note. The bank still owns and holds that note; that is, they own the renewed. This paper, Ex. B, is a mortgage deed executed by Patrick B. McCarthy and Maggie McCarthy to the First National Bank of Rapid City to secure the payment—the mortgage is on lots numbered 15 and 16 in block numbered 85 of the original townsite of the City of Rapid City,

South Dakota, to secure the payment of this $5,000 note that we have just been speaking about, and which is described in the mortgage. The date of that note and mortgage is July 22, 1891.

The date of acknowledgement is July 24, 1891. That is the mortgage mentioned in the complaint given to secure the payment of Ex. A. The mortgage is signed in the handwriting of P. B. McCarthy and Maggie McCarthy; the signatures correspond with those on the note. On or about February 17, 1896, we had a settlement or statement of account with Mr. McCarthy on that indebtedness, that note and mortgage, and at that time new notes were
598 given. The amount found due to the bank on that note after the payment accrued, was $5,675.50 as I remember. At this accounting, these notes (referring to Exs. C and D) were given. This $5,000 note and $675.50 represent the amount that was due on this note of July 22, 1891, the principal and accrued interest up to that date, and was a full and final settlement with McCarthy; and those other notes were then given to the bank; they were signed by Patrick B. McCarthy and Mrs. Maggie McCarthy. Upon those notes two small payments have been made, one July 1, 1896, paid on interest by Smith & Brown, $30; November 25, 1896, paid by Mr. McCarthy $50. These notes still belong to the bank, and are secured by the same mortgage, by the same property. No other or further payments have been made upon these last notes than those I have just mentioned, the two aggregating $80; the bank is still the owner of those notes. That (referring to Ex. F) is a mortgage executed by Patrick B. McCarthy and Maggie McCarthy to the First National Bank of Rapid City on lots numbered 15 and 16 in block 85 to secure the payment of the $5,000 note and the $675.50 note, which we have just referred to, and a part of the same transaction. It is signed by Patrick B. McCarthy and Mrs. Maggie McCarthy, and to secure the same indebtedness. Those last two notes and mortgage are now owned by the plaintiff.

On cross-examination, the witness further testified as follows:

When this alleged settlement of February 17, 1896, was made, Mrs. McCarthy was not there that I remember of.

Q. I understand you to state that there were numerous payments endorsed on that note, marked Ex. A. I will ask you if on or about March 1, 1888, Mr. McCarthy paid you $203.00 March 1, 1888?

A. That was before this note was made.

The plaintiff objects to that as not proper cross-examination if it preceded the date of the note introduced.

Objection sustained, to which the defendants duly excepted.

Q. Were there prior notes representing this same in-
599 debtedness?

A. This note of July 21, 1891—there was no prior indebtedness except two small notes of P. B. McCarthy and M. McGuire to the bank.

Q. The note then of July 22, 1891, executed by McCarthy and wife was the first loan you made to them?

A. The first loan I made to them as I remember.

Q. We want to know?

Witness asks Mr. Somers.

Defendant objects to the witness talking to other parties while on the stand.

Objection overruled, to which the defendants duly excepted.

A. I think there was possibly one renewal before this 1891 note of Mr. McCarthy or of Mr. and Mrs. McCarthy.

Q. There was one note prior to the $5,000.00 note, prior to July 22, 1891, and that note was made by McCarthy and McGuire?

A. This loan to Mr. and Mrs. McCarthy was used by Mr. McCarthy in paying the indebtedness of McCarthy & Tighe to the bank.

Q. Where is that note of July 22, 1891?

A. Dated May 22, 1889; that note was made by P. B. McCarthy, M. McGuire and Maggie McCarthy.

Q. Have you got that note?

A. Yes.

Q. Will you produce it?

A. Yes, sir.

Note produced and marked Ex. E.

Q. Was the note for $5,000.00 dated July 22, 1891, a direct renewal of the note dated May 22, 1889?

A. It was not.

Q. If there were intermediate notes, state the amount and by whom signed?

A. The loan of 1891 was made to Mrs. McCarthy, P. B. McCarthy, and the loan of 1889 was made to McCarthy & McGuire.

Defendants move to strike that out as a conclusion of the witness and not responsive to the question.

Motion overruled, to which defendants duly excepted.

600 Q. I wish you would take your books and tell the jury what notes were made by these parties or either of them, between the note of May 22, 1899, and the note of July 22, 1891?

A. I find here that in this note of January,——

Defendants object to the testimony of the memorandum.

A. You asked what notes were given after May 22, 1889.

Q. Yes, sir, up to that note of July 22, 1891?

A. I find a note here of September 7, 1888, made by George H. Riley and P. B. McCarthy for $105.00, and that was included in the renewal note of 1889.

Q. What note was given by these parties or either of them after May 22, 1889? And now you are producing a note back in 1888, and I have not inquired for anything back of that.

A. Up to what date.

Q. From May 22, 1889, down to July 22, 1891, between those dates?

A. No, sir, there was none.

Q. Now at the former trial, you testified did you not that the note

of July 22, 1891, was a renewal of this note of May 22, 1889, for $5,000.00, and some smaller notes given about that time?

A. If I did, I didn't have the notes before me at the time.

Q. It is now your contention and your testimony that the note of July 22, 1891, took up the note of May 22, 1889, for $5,000.00, and I think a $350.00 note?

A. No, sir, they borrowed the money, I will say no, sir.

Q. Was the note of July 22, 1891, a renewal of or a substitution of this note of May 22, 1889?

A. I don't so regard it.

Q. Did it represent the same indebtedness so far as McCarthy was concerned?

A. Mr. McCarthy was on the note with these parties for that amount.

Q. If McCarthy and Tighe had not signed any of these
601 notes, this note of July 22, 1891, and May 22, 1889, is the same indebtedness of McCarthy?

A. No, sir; it is not the same indebtedness; it is an indebtedness of different parties.

Q. Why do you say it is not the same indebtedness so far as McCarthy is concerned?

A. When two individuals come in there and make a loan, and a third party comes in and says we want to get money to take up this loan and want to get the other people off, we want you to let us have the money to pay off this note and get these other people off, and in this case we did that and let McCarthy have the money to pay off this note and give this security.

Q. When the note of July 22, 1891, was signed by McCarthy and wife, did you pay McCarthy any money, your bank?

A. We placed the amount to his credit; the transaction was this: Mr. McCarthy may have drawn——

Q. What did he do? Did you pay him any money? Did he get a nickel?

A. I don't think the actual cash was handled, but the proceeds of that note was turned to McCarthy's credit, and paid for the other note.

Q. Was any money placed to Mr. McCarthy's credit that day on the books of the bank?

A. I would have to look.

Q. Did he have any account on the books of the bank on that date?

A. I will look; what date?

Q. July 22, 1891?

A. It may not have gone through the actual transaction.

Q. It was not in actual money?

A. The transaction was just the same; it was not imaginary money.

Q. State your best recollection, if you have not McCarthy's account here; was any credit given to McCarthy at the bank at the time he and his wife signed the note of July 22, 1891, for $5,000.00?

A. I don't remember whether the account was credited on the book or not.

Q. At the time the note of May 22, 1889, for $5,000.00,
602 signed by McCarthy and wife and McGuire, did you pay them any money that day? Did you pay them $5,000.00 when they signed that note?

A. It is not very likely that was made a transaction in which we turned the money out at one window and in at the other.

Q. Before the note of May 22, 1889, for $5,000.00 was paid by McCarthy and wife and McGuire, before that paper was signed, did they owe you any money?

A. McCarthy and McGuire and McCarthy's wife?

Q. Yes, sir?

A. I don't think Mrs. McCarthy owed us any money before that date.

Q. Mrs. McCarthy never got any money on the note?

A. Mr. and Mrs. McCarthy got the money of course when they got the note, gave the note and security.

Q. You never paid Mrs. McCarthy any money?

A. No.

Q. When the note of May 22, 1889, for $5,000.00 was made, and before that note was signed, did McCarthy and McGuire owe your bank any money?

A. Before May 22, 1889.

Q. Yes, sir.

A. On December 19, 1888, we made P. B. McCarthy & Co. a loan of $400.00.

Q. Did they owe your bank any money before they signed this piece of paper on that day, May 22, 1889?

A. Yes, that note of George H. Riley and McCarthy & Company was owing to us that day and included in that note when it was made.

Q. Note of George H. Riley and who?

A. P. B. McCarthy & Company, for $105.00 of date September 7, 1888, and the $400.00 note of P. B. McCarthy & Company.

Q. What date?

A. That was in 1889, January 18, 1889; one for $423.00, dated December 18, 1888, that was paid by a note of $400.00 January 19, 1889, and the $400.00 note was included in the May 22, 1889.

Q. What else did McCarthy or McGuire owe you May
603 22, 1889, or your bank?

A. I could not tell without going through the books; prior to that time.

Q. Yes, and on that date?

A. One by Jennie Franklin for $100.00 endorsed by them; one by Somerod, $68.65.

Q. How much is the Somerod note?

A. $68.95. Note of $600.00 dated August 6, 1888.

Q. Whose note?

A. That one was July 28, 1888, and was P. B. McCarthy & Company and M. McGuire and D. J. Tighe.

Q. What was the amount?

A. $600.00. I find a note here August 11, 1888, by William Franklin and P. B. McCarthy.

Q. How much was that?

A. $100.00.

Q. Does that represent the same indebtedness of the Jennie Franklin note of $100.00?

A. I don't presume it does; let me see; now as I understand you want all the loans that McCarthy was a signer on.

Q. I asked you what he owed you May 22, 1889, when this $5,000.00 note was made, what he and McGuire owed you? Was any prior $5,000.00 note signed by McCarthy and McGuire?

A. After this May 22, 1889, note?

Q. Yes, sir?

A. No, sir, I think not.

Q. Was there any note prior to May 22, 1889, signed by McCarthy and wife and McGuire for $4,000.00 or over?

A. Mrs. McCarthy?

Q. No, not Mrs. McCarthy. Was there any prior note, prior to May 22, 1889, signed by McCarthy and McGuire for $4,000.00 or over?

A. There was a note made by P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe, for $4,000.00, on August 7, 1888, and also one signed by the same parties, P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe, for $600.00, same date.

Q. Now the Jennie Franklin and Somerod notes were,
604 as a matter of fact, turned over by McCarthy or McCarthy & Company to your bank to apply upon their indebtedness?

A. No, sir; they received credit for them; they discounted the notes.

Q. They were in the bank for their indebtedness?

A. No, sir.

Q. You did get it and apply it on the Jennie Franklin note and the Somerod note?

A. I think not.

Q. Do you know?

A. Yes. I know about some of them. The George W. Burch note for $16.55; Somerod note for $68.55; and note dated October 6, 1888, of P. B. McCarthy & Company for $120.00, and the Jennie E. Franklin note of $100.00, was taken up December 19, and they were all put into the new note of $423.00; Mr. McCarthy & Company took up all of these notes and gave a new note.

Q. What date was the $423.00 note?

A. December 19, 1888; they received the money on all these notes and took them up in that way.

My book shows that McCarthy paid the Somerod note and gave a new note for it. McCarthy took up the Somerod note and it was given to him. The same is true of the Jennie Franklin note and the William Franklin note; well, the William Franklin note I don't know. October 10, 1888, it is marked paid; the book shows that that note was paid October 10, 1888; the books don't show whether that note was paid by William Franklin or Mr. McCarthy. The Jennie Franklin and William Franklin notes were not the same.

Now referring to the consideration of the $4,000 note of August 7, 1888, signed by P. B. McCarthy, P. B. McCarthy & Company and D. J. Tighe, M. McGuire, I think on that date they took up a note of McCarthy, McGuire and Tighe; that note was dated April 12, and is the note that was paid August 7, 1888. That note was made for ninety days; that is the note for $4,000 signed by P. B. McCarthy, M. McGuire and D. J. Tighe; it was dated January 25, 1888, due April 23, 1888; that is the date the note was booked up; sometimes they are dated the day after taken in.

605 Q. What note did the $4,000 note of April 23, 1888, take up; look back to January, 25?

A. On August 11, 1888—no, that is the payment of the note, note of $4,000, P. B. McCarthy & Company and $600 was paid on the same date; there were two notes, one of $4,000 and one for $600.

Q. What note did the $4,000 note of April 23, 1888, take up?

A. That is pretty difficult for me to tell; on that date there was a $4,000 note paid, and a $600 note paid.

Q. When, April 23, 1888?

A. No, the date the note was taken up; you wanted to know what he paid on April 23, 1888.

Q. Yes, what was that $4,000 note of April 23, 1888, given for?

A. On April 23, P. B. McCarthy & Company paid a note of $4,000 the record shows, signed P. B. McCarthy, M. McGuire and D. J. Tighe, dated January 24, 1888, and the same date a note of $219 signed by the same was made January 24.

Q. Now, Mr. Halley, as I understand it, the note of April 23, 1888, renewed the note of January 24, 1888?

A. Signed by the same parties and the amount is the same.

Q. The $4,000 note is the same?

A. The record shows it was paid that day by the renewal.

Q. What note, if any, did the $4,000 note of January 24, 1888, pay or take up or renew?

A. None.

Q. What was the consideration for it?

A. The consideration for it was cash; the note of January 24, 1888—the loan of $4,000 was negotiated by Mr. McGuire on behalf of himself and Mr. Tighe, and he came to the bank and asked us if we would loan him and Tighe $4,000 for the purpose of buying a one-half interest in the International hotel, and I told him he could have the note provided Mr. McCarthy would sign the note as surety.

Q. Was Mr. McCarthy security in the original indebtedness?

A. He was signer on the note.

606 Q. You said you would let McGuire and Tighe have $4,000 if McCarthy would sign the note as surety?

A. I said if they would get McCarthy to sign the note.

Q. He was surety or signer for McGuire and Tighe?

A. Yes, the loan was negotiated for McGuire and Tighe.

Q. Did you pay $4,000 that day for McGuire and Tighe?

A. I turned the proceeds of that $4,000 note to Mr. McCarthy and McCarthy turned it into the bank on his original indebtedness.

Q. Was any cash passed?

A. No, sir.

Q. And credit given to McCarthy on the books of the bank for that $4,000.

A. Mr. McCarthy was right there, and whether it was credited on the books or not I can't say, but that was the transaction; Mr. McGuire and Tighe borrowed this money to pay for one-half interest in the International hotel; the notes were put there by Mr. McCarthy at the time of the execution of the new notes.

Q. So Mr. McCarthy had owed you prior to that time, prior to January 24?

A. Mr. McCarthy had owed us nearly ever since we have been in the banking business; he had borrowed money frequently during all the time when we were in business up to this time.

Q. How much did McCarthy owe you at the time you made this loan to McGuire and Tighe on January 24, 1888.

A. He owed us $4,310.

Q. What notes did you have of his at that time?

A. Four one thousand dollar notes; those were the individual notes of P. B. McCarthy.

Q. And interest $310?

A. Yes, sir.

Q. What was the date of those four one thousand dollar notes of P. B. McCarthy?

A. August 22, 1887.

607 Q. They are the same notes referred to here in the supplemental answer?

Objected to by plaintiff as not proper.

Objection sustained, to which defendants excepted.

Q. Now, Mr. Halley, you have been cashier of the First National Bank since its organization?

A. Yes, sir, I have.

Q. And about three years ago, or such a matter, you became president and Mr. Somers succeeded you as cashier?

A. Yes, sir.

Q. And in your capacity as either president or cashier, you personally attended to a great many loans?

A. I have.

Q. How did you come to remember so distinctly what took place, as stated by you a moment ago, on January 24, 1888?

A. I have good cause to think a good deal over it and remember all the circumstances connected with the loan.

Q. Since when have you been jogging your memory about it?

A. The deed is on record; Mr. McGuire and Tighe came to me to get this money to get a half interest in the hotel, and borrowed that money for that purpose.

Q. They bought one-half interest?

A. I don't know as I said anything about McCarthy's business, but I requested Mr. McGuire to have McCarthy sign this note, and we would make him this loan.

Q. Were McCarthy, McGuire and Tighe present?

A. Mr. McGuire is the only one I remember of being present.

Q. Was Mr. McCarthy there?
A. No, sir.
Q. He was not a party to that transaction?
A. No, sir.
Q. Was he later?
A. Yes, they got Mr. McCarthy to sign the note.
Q. How did you come to ask them to have Mr. McCarthy sign the note?

608 A. At the time we considered Mr. McCarthy very good financial credit and also Mr. McGuire, and I didn't know much about Mr. Tighe, and if McCarthy would sign this and they were getting the money and going in there, I wanted all the security I could get on the paper, and I thought if Mr. McCarthy was going to be interested, we should have all of the parties on the note.

Q. Then Mr. McCarthy owned the International hotel here, took McGuire and Tighe in and deeded them two-thirds interest in the property, and then signed their notes to pay their interest to you?

A. I don't know anything about their understanding; I don't know what other considerations they gave Mr. McCarthy; I understood that they wanted this $4,000 to partly pay for this interest in the International hotel.

Q. You were a witness in the former trial of this action, in April, 1897, just before the court house was burned?

A. Yes, I was a witness at the other trial.
Q. You didn't testify to these facts at that time?
A. I never thought of them; I didn't look them up.
Q. You didn't suppose there could be a defense to a usurious note?
A. As you look at it it is usurious.

Q. This transaction that you spoke of here about what took place in the bank there, and the request of McGuire and Tighe for a loan, that is a matter that you remember, and is not of record?

A. Yes, and it is correct.
Q. You could have remembered it as well then as now?
A. If it had been suggested to me.

Q. You know that it was contended that the $4,000 note of August 7, 1888, took up the four $1,000 notes of 1887?

A. No, sir, I always maintained it was not.
Q. You knew we contended for that at the former trial?
A. Yes, sir.

Q. Why didn't you tell then about this deal with McGuire and Tighe?

A. I didn't think of it.

609 Q. Four years later your memory is much more vivid about the transaction?

A. It is because I have looked up the facts.
Q. Was not that a very queer transaction on McCarthy's part?
A. I am not responsible for McCarthy's transactions.

Q. You would have let McGuire and Tighe have $4,000 at that time without McCarthy signing?

A. I think I would.

Q. You would have let McGuire have $4,000 at that time without a mortgage or McCarthy's signature as a signer?

A. I am not sure about that.

Q. Didn't you say you would not let McGuire have this money without McCarthy signed it?

A. I didn't decline, I simply told McGuire that if he would get McCarthy to sign this note we would make them a loan.

Q. When did you first take a mortgage on this property to secure this indebtedness?

A. I don't remember whether there is a mortgage from McGuire and Tighe or not; it seems we had undertaken to take a mortgage before that time, or at that time, and that Tighe declined to give the mortgage.

Q. No mortgage was given at that time?

A. I think not.

Q. Now, I will ask you, Mr. Halley, if it is not a fact that you never thought of this last point about McGuire in connection with this indebtedness until you talked the case over with your new attorney, Mr. Mason?

A. I have never mentioned this matter to Mr. Mason up to this moment.

Q. Didn't Whitfield tell you it would be to your advantage to do so?

A. No, sir.

Q. Did Mr. Fowler ever suggest that to you since the former trial?

A. No, sir, no one has except my going over the case; my counsel did not know about it until a few hours ago.

610 The notes will show how much we received upon a certain judgment of McCarthy against Jennie E. Franklin and William Franklin. That judgment was collected by me and applied on this indebtedness; to apply on the past due interest was the understanding; on November 30, 1895, we received from the Franklin judgment $500.65, it was duly indorsed on the interest on that note The judgment was assigned to me by a written assignment that we had at the former trial, and was drawn in Mr. Brown's handwriting This judgment (referring to the written assignment) was assigned by P. B. McCarthy, M. McGuire and D. J. Tighe to me; it was assigned by P. B. McCarthy representing the company; it was filed in the court March 20, 1895. Mr. Brown was the attorney for McCarthy and acted for him in turning that assignment over; it runs to me and I was acting for the bank at that time, and had no individual interest in it whatever.

Q. You say it was understood that when that assignment was turned over, the money received on the judgment was to be applied on the past due interest?

A. Yes, sir.

Q. When was that had?

A. The consideration of carrying this loan along was Mr. McCarthy's repeated promises to get the interest paid up, and we had no objection to carrying the note along if he would keep the interest paid up.

Q. Didn't you state to me in your bank, after this assignment

had been made—I went up there for some money for costs and attorney's fees to be paid out of it first—that it was assigned to you or the bank to apply on McCarthy's account, or on the account of P. B. McCarthy & Co.?

A. It is on their account; I may have told you it was to apply on the account of P. B. McCarthy; it is such a long time to remember, that I did apply it on their account.

Q. You will not deny that you stated to me that it was assigned to you to apply on McCarthy's account?

A. I don't know as I told you McCarthy's business with the bank——

611 Q. Will you deny that you did tell me that it was assigned to apply on the account of P. B. McCarthy?

A. No I will not deny it.

Q. How did McCarthy come to assign this judgment to you?

A. Because we were urging him to pay up his loan, as the examiner finds fault with paper that has been running for a long time.

Q. To put that in a different form: I notice, Mr. Halley, that this assignment recites that this judgment was recovered on the 18th day of March, 1895, and that it is acknowledged before a notary public on the 18th day of March, 1895, and was filed in the clerk's office on the 20th day of March, 1895; I will ask you if it is not your recollection that that assignment was delivered to you on the same date that McCarthy got this judgment?

A. I don't know as it was delivered to me at all; I think you had charge of the matter, and put it on record yourself.

Q. Don't you recollect that that was a purely voluntary act on McCarthy's part as the judgment was in the name of McCarthy, McGuire and Tighe, the co-partnership, and that if McCarthy didn't assign it, McGuire or Tighe might collect it, and for that reason it was assigned to you?

A. No, sir; Mr. McCarthy told me of it himself.

Q. Was not the first you heard of it when McCarthy or I told you about it?

A. No, sir, McCarthy told me about it before, that he expected to get that judgment, and I don't think that paper was ever in my hands. I think you told me about it.

Tracey & Seip made two payments of $15.00 each; I don't know whether there was an order to pay to me; I do not know how Tracey & Seip came to have that; the endorsement is this: February 11, 1895, by cash on account of interest through Tracey & Seip, $30.00. I don't remember whether I had an order for that money. I would not have the order; they would have the order. Some money was paid by an order of McCarthy accepted by M. F. Hill, to the

612 bank, to pay the bank some money; I will read you the indorsements; on the Hill order there was paid $205.50; that is all that Mr. Hill paid into the bank; Mr. McCarthy has the other notes that he took up; I don't know of any others; this record is $205.50; that is all there is paid on it; that did not include $125.00 that Kelley paid; Kelley paid $125.00 which was endorsed on the

note of $350.00 of McCarthy's; that has nothing to do with the Hill order not that I know of. The endorsement of March 6, 1893, Box Elder, $30.50, May 13, 1893, The Box Elder Company paid that for Mr. Hill. I have the order paid there by Challis, May 3, 1893. Kelley was indebted to Mr. McCarthy and Mr. McCarthy instructed me—I don't know—yes, I do, I think Mr. Kelley got the money from the Box Elder Live Stock Company; I don't really remember; that has nothing to do with the $205.50 by reason of the Hill order; McCarthy paid a $350.00 note, and this $125.00 of Kelley was a part of it. This Kelley payment is no part of the Hill order. Those endorsements on the Hill order are in my hand writing. And it was by virtue of this order that the $130.50 was paid by Hill for McCarthy.

Q. Now I will ask you, Mr. Halley, after refreshing your recollection by looking at this Hill order, if that Tracey & Seip order was not put into the same note?

Plaintiff objects as not the best evidence.

Objection sustained, to which defendants excepted.

Q. Now, I notice, Mr. Halley, that this Hill order reads as follows: "Rapid City, S. D., Dec. 12, 1892. M. F. Hill: Please pay to the First National Bank of Rapid City the sum of two hundred fifty dollars on account due November 16th, 1892, and charge to my account and oblige, P. B. McCarthy. Accepted. M. F. Hill." Now, I will ask you how you came to note the payments made by Hill as interest payments?

A. With an understanding with Mr. McCarthy.

Q. When did you have that understanding?

A. We presented these notes very frequently and urged him to pay them up.

613 Q. When he turned this order over to you, did he make a specific direction for you to apply the money on interest?

A. No; these notes were turned in to us at our urgent solicitation for the payment of interest, but whether it was turned in at his specific request, I would not say.

Q. Mr. McCarthy also gave Mr. Lake, for the bank, an order on Keenan to pay rent to the bank for the rooms that he occupied in the International hotel?

A. Yes, sir.

Q. Was that a written order?

A. I can't tell; I went down to see Mr. Keenan and to see if it was all right, and to see if he would pay in the $25 and he agreed to pay in a certain amount.

Q. To refresh your recollection, I will ask you if Mr. McCarthy didn't give Mr. Lake that order at Hot Springs, and he sent it up to the bank?

A. I don't know; Keenan would have the order.

I know I have not any such order; it would be turned over to Mr. Keenan for his authority to pay the rent; I don't know whether there was a written order for the Keenan rent or not; every endorsement is here as it was paid; I have Mr. Somers collect the payments; all I know about what he got is what Mr. Somers told me and his checks;

I only know what Mr. Somers reported to me, except what Keenan claimed to have paid; the entire payments credited Mr. McCarthy on his indebtedness by reason of the Keenan rent paid to the bank would be about $613. Mr. Keenan claimed McCarthy owed him one hundred and some dollars, and he would not pay any until that was paid; I can't tell you the time Keenan paid us the rental; July 25, 1893, was the first payment, $25; February 6, 1894, $40; April 4, $40; May 22, $40; June 5, 1894, $19.50; June 11, 1894, $2.95; September 18, 1894, $27.75 or 78 cents; October 11, 1894, $10; November 9, 1894, $25; December 4, 1894, $25; December 29, 1894, $1.60; March 20, 1895, $25; April 2, 1895, $25; May 6, 1895, $25; June 1, 1895, $25; July 1, 1895, $25; August 12, 1895, $25; September 2, 1895, $25; October 2, 1895, $25; November 11, 1895, $25; December 12, 1895, $25; January 2, 1896, $12.50;
614 making a total of $613. There were no payments from July, 1893, to January 1, 1894, at the rate of $60 per month; every payment made by Keenan is endorsed on these books; I put it down; I know it from what Somers told me. I cannot handily refer to the record of all the payments made on the indebtedness without going over the books; if you will mention any notes or the dates, I will tell you, but I can't very well go over 15 or 16 years here of the books.

Redirect examination:

After the four $1,000 notes of August 2, 1887, made by P. B. McCarthy, the next note was one of four thousand dollars, January 24, 1888, signed by P. B. McCarthy, M. McGuire and D. J. Tighe. Also on January 24, 1888, there was another note of $219 signed by the same parties; the record shows that it was paid April 12, 1888. The entry is, paid, bills receivable on April 12, 1888; and on April 12, 1888, the new loan shows a note made by P. B. McCarthy and M. McGuire for $219, that is a new transaction. This $219 note dated April 12, 1888, was paid on August 6, 1888, by Mr. McCarthy's check for $231.81. There is a record here of a $600 note dated July 20, 1888, signed by McCarthy, McGuire and Tighe; August 11, there was a new note made to P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe, for $600; it shows it was paid on September 7, 1888, on the page bills receivable; on September 7, 1888, there was a loan made to P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe for $600; it is marked paid on October 6, 1888; the record shows it was paid in cash On October 6, 1888, there was a note of P. B. McCarthy & Company for $120; I don't know that there is any connection between the $120 note and the $600 note; on December 19, a loan was made to P. B. McCarthy & Company for $423, which was disposed of on January 19, 1889. On December 19, 1888, the book shows that P. B. McCarthy & Company made a loan on that date of $423, which was paid on January 19, 1889, on which date there was a loan of $400 made to P. B. McCarthy & Company, which was paid July 3, 1889. On May 22, 1889, there was a note of $5,000 made by

P. B. McCarthy, Maggie McCarthy, M. McGuire and P. B.
615 McCarthy & Company; that note was paid on February 17,
1896, the 1891 note was a renewal note or intermediate note; this No. 13,850, May 22, 1889, corresponds with our principal; this was paid by Ex. A, the note of May 22, 1889, was paid on July 22, 1891, the record shows that it was paid on that date, and that this loan was made on that date. Turning back to April 12, 1888, I find a note there of $250 signed by Mr. McCarthy alone, April 12, 1888; that was paid June 15, 1888; the record shows that it was paid on that date, $250. June 15, 1888, there is a loan to P. B. McCarthy, a $250 note. That was disposed of August 10, 1888; there is an entry of August 10, 1888, bills receivable for $250 paid by P. B. McCarthy. Returning again to the first $4,000 note of January 24, 1888, signed by McCarthy, McGuire and Tighe, from my record that note was paid April 23, 1888, was disposed of at that time; turning to that date my book shows a transaction with these parties; it shows that a $4,000 note was paid on that date by P. B. McCarthy and others; the entry is P. B. McCarthy, et al., April 23. Looking at my discount register, I find on April 23, a note made by P. B. McCarthy, M. McGuire and D. J. Tighe for $4,000, which was disposed of on August 11, 1888. Turning to my record of August 11, 1888, I find August 11, a note made by P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe for $600, and one by the same parties for $4,000; that $4,000 note dated August 11, 1888, was disposed of September 3, that other note is dated August 7, but entered up August 11th; the $4,000 note was paid July 3, 1889; the date of the new note given is July 3, 1889, a note made by P. B. McCarthy, Maggie McCarthy, M. McGuire and P. B. McCarthy & Company; that is the same number and the same note as this one dated May 22, 1889, for $5,000, marked Ex. E; this note while dated in May, is entered in our books in July, and that was because we were holding it for the signature of Mr. Tighe, who was not here at that time, I think he was off selling trees; it is our custom to enter notes in our books when completed; there is a $400, a $100 and a $4,000 note covered by that note; it does not show what the
$100 note is. Turning again to my bills receivable of date
616 July 22, 1891, I find there a note of P. B. McCarthy and wife for $350, dated July 22, 1891, due August 31, 1891. Turning to July 24, 1891, I find two notes of P. B. McCarthy and wife of $250 each, one due in thirty days and the other October 22, 1891. Now examining again Ex. A and Ex. E, Ex. E being the note of May 22, 1889, that was paid by the proceeds of Ex. A, for $5,000, dated July 22, 1891; that is the note first referred to in my direct examination, and which I said was renewed by the two notes, Ex. C and D.

Now, as to this Franklin judgment, I have $150 attorney's fees paid to Mr. Brown, and the clerk's bill, costs of the suit; I paid Mr. Brown and the clerk's costs under Mr. McCarthy's direction, and this sum of $500.65 is the net balance left in my hands. In regard to Keenan's rent we received whatever Mr. Keenan paid, and applied it on that; the question as to how much he should pay was between McCarthy and Keenan; I could not recollect the rate he paid. At

the time this Ex. A was paid or renewed by Ex. C and D, Mr. McCarthy was present, but as to whether he figured it up or not I could not say; before that time I had made all of the entries on this note, Ex. A, and they appeared in the same manner as they now appear, as shown there on the note, and Mr. McCarthy at that time had access and examination of this note, and did examine it at the time of the settlement in 1896; yes, he saw the note and knew the amount was correct before he made the new papers. The plaintiff bank has paid the cost to be paid in taxes upon the mortgaged premises; I could not remember the amount without looking at the certificate. There (referring to bunch of ten tax receipts marked plaintiff's exhibit G) are the receipts for the taxes which the bank has paid, the plaintiff furnished the money for the payment of the taxes as evidenced by the receipts, Ex. G; no part of that money has been returned to the bank; the various items of payments were made at the various dates of the receipts; one is assignment of the tax sale from the county, those payments were made to protect the indebtedness against the property described in the mortgage. The payments were made under the mortgage, under our rights of the mort-
617 gage; we don't deal in tax sale certificates; it was made for the purpose of protecting our claim on this property, not for any other purpose. Mr. McCarthy was behind on the payment of his interest and the bank was constantly jogging him up to pay the interest; and not since the settlement of $5,675 was it at any time fully paid up; I don't think it was at any time up prior to that, the payments there themselves will show. Mr. McCarthy paid the notes of Somerod, Burch and Mr. and Mrs. Franklin; and we have traced them to the notes in suit.

Q. Now have you given either on direct or cross-examination here all the notes that you have run across in your record covering that period of time?

A. All that I have run across; there might be some other smaller notes we have overlooked; all I could find with a pretty careful examination; I have not overlooked any of the large notes because we have memorandums of them.

Recross-examination:

Q. I notice, Mr. Halley, that you had a tax sale certificate here for the delinquent taxes on the mortgaged premises for the year 1896; how did you come to take that tax sale certificate if you wanted to pay these taxes?

A. Under the advice of our attorneys; Judge Gardner advised us, was our attorney at that time, and who attended to this transaction.

I have paid a large amount of taxes in this county in recent years, and am familiar with the rules regarding tax payments that obtain in the treasurer's office, but we have not made a business and are not familiar with.

Q. Tell the jury about how much less money it would have taken to have settled these taxes if you had taken in form a tax payment instead of having these certificates and receipts marked prior and subsequent taxes?

A. Not a dollar.

Q. Under this method of virtually buying the county's tax title, you had to pay the full amount of principal and interest to date?

A. Whatever the receipts called for.

Q. In payment in this way or fixing it up in this way, you
618 had to pay the full amount right up to date?

A. As shown in these receipts.

Q. Had you paid it as a direct payment as mortgagee, you would have saved from one to two hundred dollars? Paying them at the date when you did pay them, March 23, 1898, if you had stepped into the treasurer's office and taken receipts as the First National Bank, mortgagee, you would not have paid any penalty and interest for the years prior to 1896?

A. I am not aware that I would—at that time I did not know that we could have paid these taxes for less money.

Q. You knew you could not have taken advantage of it if you had taken a tax sale certificate?

A. No, sir.

The two records I have been referring to here are the bills payable and discount register. All of the loans made are in the discount register, and a record of the amount of the notes and when matured. When a note is paid it is entered up in the bills payable book. In both of these records we enter the amount of the note, date and maker or signer, and in the bills payable when paid. Sometimes we enter in the discount register when paid, but it is not necessary. Here in the discount register I have a note for $250 of date April 12, 1888, made by P. B. McCarthy alone; reading it literally the record is maker, P. B. McCarthy; endorsers; next is the date April 12, 1888; and the time is sixty days; and when due June 11, 1888, rate of interest, 18 per cent; discount seven and one half per cent $7.50, that is the interest, and net, is marked $250; amount $257.50; paid June 15, 1888, and then there are remarks, and that says paid June 15, 1888. There is a record of the note for $250 made by P. B. McCarthy June 15, 1888; there is a column of remarks; after amount comes when paid, and under remarks there is nothing; the record shows that that note was paid June 15, 1888; I don't know how it was paid; on that same date a loan was made, and it is presumed he took up that note by another note.

Q. You know whether it was paid in cash or taken up by another one?

619 A. I suppose it was made by this new note, but I can't swear to it.

Q. You think he paid it by a new note?

A. Yes, but I would not swear to it.

Q. Is it in that same discount register you have the note for $250 of June 15, 1888, by P. B. McCarthy?

A. Yes.

Q. Read that?

A. Maker, P. B. McCarthy; where payable Rapid City; date June 11, 1888; time sixty days; when due August 10, 1888; rate of in-

terest 18 per cent; discount $7.50; net amount $250; amount $257.50; August 10, 1888, paid.

Q. Now, is that not entered in your bills receivable record under date of August 10, 1888?

A. As paid, yes, sir; do you want that record?

Q. Yes, you have a record of August 10, 1888?

A. I don't know until I look at that; $250 note of P. B. McCarthy was paid on August 10, 1888.

Q. Was there a new loan made on August 10, 1888?

A. There don't seem to be any note made on that date.

Q. Then turn to the bills payable record and give us the literal record, as it appears, of this $250 not- of August 10, 1888; the note of June 15, 1888, paid August 10, 1888?

A. When collected August 10, 1888; for whose account; bills payable account; upon whom, P. B. McCarthy; amount $250; exchange, none; interest, $7.50; proceeds, $250.

Q. That indebtedness was paid by him in cash?

A. I presume; it is paid.

Q. There is no record of his making a new note for the old note?

A. There is not.

Q. Then you would say it was in cash?

A. I could not say; it is paid, and the bank got the equivalent.

Q. Is the same record made when a note is paid in cash as where it is paid by a new note?

A. Yes, sir.

Q. Or if it is paid by chips or whetstones?

A. Yes.

620 I said a moment ago that the entry in this column was discount, that should be interest; it is discount if taken out in advance and interest if paid at the maturity of the note.

Q. Now, Mr. Halley, I wish you would turn to the record of that $4,000.00 note of August 7, 1888, in the discount register?

A. Note of McGuire and others.

Q. Yes, of McCarthy and others? I wish you would read that record as it actually appears there to the jury?

The plaintiff object- as not the best evidence, and as a subterfuge to avoid the introduction of the note.

Objection sustained, to which ruling the defendants excepted.

Q. I will ask you this question, Mr. Halley; if under the head of the names of the makers you did not have P. B. McCarthy & Company and P. B. McCarthy, and under the head of endorsers, M. McGuire and D. J. Highe?

A. The space in the books does not allow the proper heading.

Defendants move to strike out the answer as not responsive to the question.

Motion granted.

Q. Now, Mr. Halley, I wish you would be kind enough to turn to the discount register for the note of January 24, 1888, the $4,000.00 note?

A. Here it is; in this entry Mr. McCarthy and McGuire appear in the makers' line.

The defendants offered in evidence the said entries and record in the discount register of the bank as to the $4,000 note of January 24, 1888, and the $4,000 note of August 7, 1888; from which it appears that the names of P. B. McCarthy & Company and P. B. McCarthy were entered under the head of the names of the makers of said $4,000 note of August 7, 1888 and under the head of endorsers of said note were entered the names of M. McGuire and D. J. Tighe; and under the head of the names of the makers of said $4,000 note of January 24, 1888, were entered the name P. B. McCarthy and a part of the name M. McGuire, the name of D. J. Tighe and the larger part of the name of M. McGuire appearing under the
621 heading of endorsers of said last named note. And the defendants exhibited said last named record to the court and jury.

The notes I have testified to were all that I have been able to find in these books, the record of them. This note that you hand me of May 22, 1889, for $500, signed by McCarthy, McGuire and Maggie McCarthy is payable to Lake & Halley, and was not in there; I don't know whether that is a part of this same indebtedness, it is not an interest note and made payable to Lake & Halley for convenience, I think not; it does not enter into the First National Bank paper. We have not frequently taken interest notes on an indebtedness like this to Lake & Halley or to myself; I cannot tell you what is the consideration of this note, it was not a part of this indebtedness. I find this $400.00 of date January 19, 1889, by McCarthy & Company; it was taken up July 3, 1889. I cannot tell you how it was paid; I do not know whether it was paid in cash or in a new note. It is marked paid. I have a record here of a $100.00 note of November 17, 1888, by McCarthy & Company payable to the bank in four months; that note was paid July 3, 1889; I don't know how it was paid, whether in cash or a new note; by looking in the other book I could tell whether there was another note given or not; that would not necessarily be conclusive proof. We had another note for $400.00 by McCarthy and McGuire of the same date; it was paid July 3, 1889, but I do not know how.

Q. Now referring back to as far as we have gone, August 22, 1887, on that date McCarthy, personally, and wife owed the bank $4,000.00?

A. Yes.

Q. Now McCarthy or any one for him has never paid that indebtedness?

A. Yes, sir.

Q. Leaving out any argument, aside from the notes that McGuire and Tighe got onto, McCarthy still owes that original indebtedness?

A. No, sir.

Q. Why?

A. That was settled when McGuire and Tighe got that interest in that property.

Q. That is the only way it was paid, if paid at all, by this loan you made to McGuire and Tighe?

A. Yes, sir.

Q. If McCarthy was the principal in that $4,000 note of
622 January 24, 1888, then his original debt never has been paid, has it?

Plaintiff objects as calling for a conclusion of the witness and accumulative. Objection sustained to which defendants excepted.

A. I regard Mr. McCarthy as one of the signers of the new note of McGuire and Tighe; you can regard it as a joint note, but I regard all of them as equally responsible.

Q. You don't regard McCarthy as surety?

A. I do not.

Q. When I say surety, and if McCarthy was a surety, he could compel you in law to resort to McGuire and Tighe first?

A. I understand that if McGuire and Tighe did not pay that indebtedness, we would have McCarthy pay it.

Q. Do you regard McCarthy as held on that note equally with McGuire and Tighe?

A. They were joint signers, and I regard him equally with McGuire and Tighe.

Q. He was just as much a maker of the note as McGuire or Tighe?

A. I regard him as one of the joint makers; I thought we would have to sue all at once if we sued, and that they were joint makers.

Q. And that is true also of the subsequent originals of that $4,000 note?

A. Every man that signs a note with another we consider them all as jointly responsible.

Q. This note of August 7, 1888, that is a renewal of the note of January 24, 1888, the same names on the paper, the same debt?

A. Yes, and the same parties.

Q. Now, on this paper of August 7, 1888, signed by P. B. McCarthy & Company, P. B. McCarthy and M. McGuire and D. J. Tighe, they were all equally bound on that paper?

A. Yes, sir, they adopted the name of P. B. McCarthy & Company.

Q. Then following that on down to the note of July 22, 1891, so far as McCarthy is concerned, that represents the same debt he owed you back there, only it is increased?

623 A. The new note of July 22, yes; there was no other loans to McCarthy.

Q. It is the same old debt, so far as McCarthy is concerned, as the $4,000 note referred to?

A. As the McGuire and Tighe $4,000 note, yes, sir.

Q. Is it the same indebtedness so far as McCarthy is concerned except in the interest?

A. There is some other notes in there.

Q. Were not all of these so called loans interest on the original indebtedness?

A. No.

Q. Can you name to this jury a single dollar you gave to McCarthy, except notes given for interest?

A. How can I do that? The bank records show that McCarthy has borrowed money and paid it.

Q. Can you show wherein McCarthy in any manner became indebted to your bank, except by accumulations of interests?

A. The note of $250 you just spoke of.

Q. Tell the jury what the consideration of that $250 note of date April 12, 1888, was, if you know?

A. I don't know.

Q. There is nothing on your records by which you can say that $250 note represents accrued interest or a distinct loan that you made to him?

A. The record shows that Mr. McCarthy did not pay any interest on that date.

Q. What record is that?

A. Bills payable, but hold on, I have got May 12; on April 12, it shows that Mr. McCarthy paid a note of $250.

Q. What is the original of that $250 indebtedness, and didn't Mr. McCarthy give that because of his arrears on interest?

A. I could not say; I will see if I can find anything; Mr. McCarthy gave that $250 note on March 1, 1888, which he paid on April 12, 1888; now I will see if he paid anything on March 1st; on that day Mr. McCarthy paid a $200 note; so he must have paid a $200 note and borrowed $50.

Q. Read the record?

A. On March 1st, date when collected, bills receivable, P. B. McCarthy & Company $200.

624 Q. Is there anything there to show you that was paid?

A. No, the record shows that Mr. McCarthy didn't pay only $200 to the bank.

Q. Didn't he owe a large amount of interest on the indebtedness at that time?

A. The notes will show that.

Q. Was that $50 endorsed on the $219 note of January 24?

A. No, sir; any payments that were made were made on the same dates the notes were made, and the only entry is on the day he made the $250 loan.

Q. The day he made the $250 loan he paid what?

A. $200.

Q. What date was that?

A. March 1, 1888.

Q. And that $250 note was not paid until the following August?

A. I had the record just a moment ago.

Q. One time I got it August 12, and one time August 10; now at that time you turn to your record of the original indebtedness, and state how much interest if any, was due on the main note of $5,000 of January 24, 1888?

A. You mean on Mr. McCarthy's individual indebtedness, or on the note of January 24, 1888.

Q. On the note of January 24, 1888?

A. That is the day it was made.

Q. And came due April 23, 1888?
A. Yes.
Q. How much interest was due on that indebtedness March 1, 1888?
A. The payment was made on April 23, 1888.
Q. The $4,000 note was renewed April 23?
A. And there is no interest paid between that time.
Q. Can you recall any other transaction you claim to be an independent loan to Mr. McCarthy besides the principal indebtedness and accumulations of interest?
A. No, sir.

Redirect examination:

I think the money on the Somerod note on which Mr. McCarthy was an endorser, was put to their credit; it was in addition to any accumulation of interest; that note does not represent interest, they paid the money in there and got credit for it, and also the
625 Franklin note; the same was true of the Jennie Franklin note, that it was money advanced and not accumulative interest; that money passed to McCarthy's account and was checked out by him. The money on the Burch note for $66.55 was paid out. As to the Mrs. Franklin note for $100 endorsed to McCarthy, I can't tell whether that Franklin note was carried to their credit or account, or got the money on it; Mrs. Franklin probably got the money on that note and McCarthy paid it. None of this in which other parties either received or which McCarthy endorsed, represented any connection whatever with this $4,000 debt. Yes, our bank books here are kept in the usual and ordinary method of keeping bank books, I believe so. A note like this $4,000 note, this discount register shows each payment of interest; it does not show when it is paid except on the bills payable book; the two books are used together, and it does not show separately. Then no one appearance of these entries here will show the entire transaction as to what that note went into; one entry is not a complete history of the transaction; that is why I am unable to answer without going through the entire books; Mr. Brown asked me to find one case and I found that; I don't know, it would be a pretty big job to go through twelve or thirteen years and find out just what he had paid. Referring there to the $600 note of July 20, 1888, that is the first of that size. This $600 note was made up of a $400 note and a $200 note; I find March 1st $400 note made by P. B. McCarthy, M. McGuire and D. J. Tighe, paid July 20, 1888; I guess that is the first appearance of that $400 note; the $200 — was dated January 31, 1888, and was signed by P. B. McCarthy & Company. Mr. McCarthy paid nothing that day, so that is the first appearance of that note.

Recross-examination:

Q. It was March 1, 1888, the date of that $400 note, that you thought you saw some evidence that $50 was loaned to Mr. McCarthy; that probably went into that $400 note? You had $50 left

over and on the same day we find that Mr. McCarthy gave a note for $400.

A. He gave a $250 note and a $400 note March 1.

626 H. W. SOMERS, sworn as a witness on the part of the plaintiff, testifies as follows:

I have been connected with the plaintiff bank since 1885; for about three years have been cashier, and prior to that time I was collector and bookkeeper; in July, 1891, I was in Rapid City. This (referring to plaintiff's Ex. A) I have seen among the bank's papers; the same is signed by P. B. McCarthy, the defendant, and Maggie McCarthy, his wife; the endorsements on the back of the note are in Mr. Halley's handwriting; those Keenan entries were made on account of rent from Mr. Keenan; I collected most of that rent personally. The total amount of money paid by Mr. Keenan was $613, I believe. It is all endorsed there as the payments were made. I know about the Hill matter; that was paid to me personally. The amount paid on that account was; on August 16, 1892, $60; August 18, 1892, $40; September 3, 1892, $35; September 10, 1892, $15. There were no other payments on that account not credited. I don't think I collected the Challis payment of $25; I think Mr. Halley collected that on May 23, 1896. The bank still owns this note. Ex. B purports to be a real estate mortgage signed by P. B. McCarthy and Maggie McCarthy, his wife, on lots 15 and 16 in block 85, original townsite of Rapid City, dated July 22, 1891, securing note of $5,000—this note here and running to the plaintiff. I was present when the mortgage was signed by P. B. McCarthy and Maggie McCarthy, and took their acknowledgment as notary public; that is my signature and seal to the acknowledgment. Ex. C is a note of $5,000 given by P. B. McCarthy and Maggie McCarthy, dated February 17, 1896, to the First National Bank; and Ex. D is a note of $675.50, dated February 17, 1896, signed by P. B. McCarthy and Mrs. Maggie McCarthy, to the plaintiff; they are now owned by the plaintiff; they are the subsequent notes and renewals of Ex. A just described. On the $5,000 note, Ex. C, has been paid on July 1, 1896, on account of interest $30. November 25, 1896, paid on interest $50; those are the only payments on either of them; they are still owned by the bank and unpaid. Ex. E is a note for $5,000 dated May

627 22, 1889, signed by P. B. McCarthy, Maggie McCarthy and M. McGuire, endorsed by P. B. McCarthy & Company. I know of no other payments than those endorsed upon it, those endorsements are four in Mr. Halley's and one in Mr. Lake's handwriting. Mr. Lake's endorsement is the third one (reading it) June 5, 1890, interest paid to May 22, $100. At that time Mr. Lake was president of the bank; that is Richard C. Lake, now of Chicago. Plaintiff's exhibit F is a mortgage signed by P. B. McCarthy and Mrs. Maggie McCarthy, dated February 17, 1896, from P. B. McCarthy and wife to the First National Bank securing a note of $5,000, and a mortgage on lots 15 and 16 in block 85 of the original townsite of Rapid City.

By Mr. WHITFIELD:

Gentlemen of the jury: Ex. F reads as follows—the defendants object to the reading of Ex. F as a mortgage not mentioned or described in the complaint. Objection overruled for the present, to which the defendants duly excepted.

I know the signatures of the parties to that mortgage; those are the signatures of P. B. McCarthy and Mrs. Maggie McCarthy. As an officer of the plaintiff bank I know of the payments of the taxes on the mortgaged premises described in Ex. B by the plaintiff. The bunch of tax receipts marked by the reporter as Ex. G represent or are the receipts evidencing the payment of those taxes by the bank; the taxes were paid at the dates those receipts are dated; the plaintiff furnished the money for those taxes, and that money has never been repaid by the defendants or anyone.

Q. For what purpose were the taxes paid upon the premises?

Objected to by the defendants as calling for a conclusion of the witness.

Objection overruled, to which the defendants duly excepted.

A. Paid to protect our interest in the mortgage which we hold, this mortgage, Ex. B which I have identified.

Q. And but for that mortgage and the bank's interest, would the bank have paid those taxes?

Objected to by the defendants as calling for a conclusion
628 of the witness and as leading and suggestive.

Objection overruled to which the defendants duly excepted.

A. It would not.

Q. It was for the protection of the mortgaged property, and for the mortgagee's interest, if you know?

Same objection, ruling and exception as last above noted.

A. Was the payment of the taxes for the protection of the bank's interest, and for that only?

Objected to as calling for a conclusion of the witness, and as leading and suggestive.

Objection overruled, to which defendants duly excepted.

A. Yes, sir.

Q. The complaint in this action sworn to by yourself, the supplemental complaint verified by yourself, states that no action or proceedings have been had at law or otherwise to secure the amount due under the mortgage, Ex. B, or any part thereof, except that a tax deed was issued to the plaintiff for the taxes against said mortgaged premises for the year 1894, and an action was commenced for the possession of said premises under said tax deed, but said action has been dismissed and is not now pending; do you know of that other action?

A. Yes, sir.

Q. That is your signature to the complaint in that other action?

A. Yes, sir.

Q. Under what circumstances was that other action brought?

A. We took that action under the advice of our attorney as the best means of protecting our interest in the property.

Q. Is that the only action that has been brought that you know of at all to enforce the deed or notes sued on in this complaint?

A. It is the only one I know of.

Defendants waive the formal identification of the files by the clerk in that case.

Plaintiff offers in evidence Ex. H, being order dismissing action in the circuit court in Pennington county, South Dakota; en-
629 titled First National Bank of Rapid City, South Dakota, a corporation, plaintiff, versus Patrick B. McCarthy and Maggie McCarthy, defendants, dated October 4, 1900, which was entered in order book 1, page 365, filed in this court October 5, 1900, by the clerk of this court.

By Mr. Brown:

The defendants object to this order as incompetent for the reason that it appears to have been made without any notice to the defendants, and it will appear by the other files in the case which the plaintiff is about to produce that the defendants, Patrick B. McCarthy and Maggie McCarthy, appeared in the case, by myself and filed an answer; that the case was noted for trial; and that this so called order of dismissal was inadvertently made by the court without any notice whatever to the defendant; and we insist that the order was made without notice to counsel and is therefore absolutely void, and that the action is still pending, and will be without proper order.

Objection overruled pro forma, to which ruling the defendants duly excepted.

A copy of said order, Ex. H, is hereto annexed as a part of this bill.

The plaintiff now offers in evidence Ex. A, being the $5,000 note of date July 22, 1891, heretofore identified by the witnesses, Somers and Halley, together with the endorsement on said note.

Objected to by the defendants as there is a large number of endorsements on that note in the handwriting of the officers, and entered as interest; and the defendants object to the offer of these endorsements as purporting to show how the payments were made, as self serving declarations of the plaintiff.

Objection overruled to which defendants excepted.

The plaintiff now offers in evidence Exhibit B, being the mortgage dated July 22, 1891; also the $5,000.00 note marked Exhibit C, and the $675.50 note, marked Exhibit D, both dated February 17, 1896, together with all endorsements thereon.

The defendants make the same objection to the endorsements as was made to the endorsements on Exhibit A, as being self serving declarations of the plaintiff.

630 Objection overruled, to which defendants duly excepted.

Copies of said Exhibits A, C, and D, with the endorsements thereon, are hereto annexed as a part of this bill.

Said mortgage, Exhibit B, was in the usual form of a mortgage deed, and contained the usual clause with reference to the payment

of the taxes upon the mortgaged premises, providing that the mortgagors should pay said taxes and that if they neglected to do so, the mortgagee might pay the same, and add the same to the mortgage debt, and the mortgage should stand as security therefor.

A more particular statement of said Exhibit B is found on page 136 as a part of this bill.

Plaintiff also offers in evidence the bunch of tax receipts with the said tax sale certificates on the mortgaged premises for the year 1894, identified by the witnesses, Halley and Somers, and all being attached together and marked Exhibit G, and being for the years, 1890 to 1899, inclusive, upon the mortgaged premises, and amounting in the aggregate to $1,484.00, together with the assignment by Pennington county to the plaintiff of said tax sale certificate, and all the endorsements.

Copies of said tax receipts, tax sale certificate and assignment thereof, with the endorsements, are hereto annexed as a part of this bill.

Cross-examination:

Q. I will ask you Mr. Somers if Ex. C and D being the notes dated February 17, 1896, for $5,000.00 and for $675.50 respectively, and executed by P. B. McCarthy and Maggie McCarthy, are not renewals of Ex. A, being a note for $5,000.00 dated July 22, 1891, executed by the same parties, and the difference in amount representing the accrued interest?

A. Yes, sir, they are renewals of the first note of July 22, 1891, all being signed by the same parties.

Q. And the execution and delivery of Exhibits C and D paid Ex. A, did it not?

A. Yes, sir, they were given in settlement of Ex. A.

Q. You testified in the direct examination that the plaintiff was the owner of Ex. A, did you not?

631 A. Yes, sir.

Q. Will you explain that to the jury? If it was taken up and paid by Exhibits C and D, how the plaintiff can at this time be the owner?

A. The note was not delivered to Mr. McCarthy at that time because the mortgage was still held to evidence the indebtedness.

Q. But it was in fact paid by Exhibits C and D?

A. The notes were given in renewal of that course.

The endorsements contained in Ex. A, are not made in my handwriting: some of these items I collected myself and turned over to Mr. Halley, who made the endorsements. It is not a fact that in addition to the endorsement contained on the back of Ex. A there was a payment made by Mr. McCarthy thereon, paid by Mr. Kelley on the order made by McCarthy to the bank and drawn on M. F. Hill, for $125.00; that was endorsed on the $350.00 note of McCarthy. I don't remember whether the $350.00 represented the former accrued interest on the indebtedness. I presume I could ascertain by an examination of the record whether or not the $350.00 note I have spoken of was given for the accrued interest on the in-

debtedness represented by the notes marked Ex. A, C and D. That note of $350.00 (referring to bank book) was given as interest on Exhibits A, C, or D. The $350.00 note was dated July 22, 1891, and the date of its final payment was January 13, 1893; endorsement on it before that time. I collected most of the rents from Mr. Keenan during the time he occupied a portion of the International hotel. The first endorsement seems to be $40 at a time for several endorsements; later it is $25. Mr. Keenan never paid me $60 per month. I do not know what time the rental was changed from $60 to $40 per month; the endorsements on here later seem to have been $25 at a time; as I understood at the time, Mr. Keenan objected to paying that much rent, and he went to Mr. McCarthy and had the matter adjusted; Mr. McCarthy told me to collect $25 per month. I think we had a written order from Mr. McCarthy to collect this rent; I have not that in my possession or among the records of the bank; I think I cannot state to the jury the contents
632 of that order; I presume it was delivered to Mr. Keenan; I could not swear; I would probably deliver it to him to start with; I do not know of my own knowledge what became of that order; I have not seen it among the papers or records of the bank and don't think it is, but would not swear positively; I presented it to Mr. Keenan of course, I can't state whether Mr. Keenan kept or returned that order; I don't know where the order is or what became of it of my own knowledge.

Q. State as near as you can the contents of that order to the jury.

Objected to by plaintiff as argumentative.

Objection sustained to which defendants duly excepted.

—. I gave evidence I believe in the former trial of this case in this court some time in April, 1897; I don't remember whether Mr. Keenan was a witness on behalf of the plaintiff at that time; I didn't stay through the whole trial; I have no knowledge of that order being produced at the former trial.

Q. Mr. Somers, I call your attention to what purports to be an order given by P. B. McCarthy, one of the defendants here, dated December 12, 1892, drawn on one M. F. Hill, and accepted by him to the First National Bank of this city; I will ask you to examine that and state whether or not the order drawn on Keenan was not practically the same in form as the paper which you now have.

A. I presume it was the same general form; this calls for a specified sum.

Objected to by plaintiff as calling for a conclusion of the witness and as secondary, and no foundation laid.

Objection sustained, to which defendants duly excepted.

I notice the note has endorsements by Hill for $60, that does not show on the back of the order; also one of $40.00, one of $35.00, and one of $15.00. I don't know whether the sum of $125.00 paid by one, Kelley, was on the same order or not; I do not know of any other order drawn on Mr. Hill by Mr. McCarthy in favor of the bank other than the one mentioned. I don't believe I was
633 present in the court room at the former trial of this case when James Keenan was called as a witness and testified. About

the evening or the next morning after this case was finally tried in April, 1897, the court house of this county was destroyed by fire, and the stenographer's notes were destroyed by fire, and there was some difficulty in preparing a bill of exceptions; and I made an affidavit as to the contents of my testimony, but I don't know that Mr. Keenan made one; I have no knowledge of Mr. Keenan making the statement that his total payments to the bank were $770.00. The total amount of money received by me or the bank from Mr. Keenan pursuant to the order given by Mr. McCarthy, and applied on this indebtedness, was $613.00 as I remember it, I get that from the endorsements on the notes; I have no independent recollection of the matter aside from the endorsements contained on the notes; I collected most of this rent and reported it to Mr. Halley and he made the endorsements on the notes; all the endorsements or the Keenan rent so far as it has been referred to on the notes, Exs. A, C and D, are in Halley's handwriting. I don't know of any other order drawn by McCarthy on Hill than the one of $250.00 dated December 12, 1892. As to the amount paid on this order of December 12, 1892, drawn on Hill by McCarthy, there are four endorsements here on the note showing a payment by Hill that do not show there, and that amount to $150.00. That would make $250.50 paid pursuant to that order. I could not state to the jury positively whether or not the $125.00 paid by Mr. Kelley was paid under or pursuant to this order. Mr. McCarthy signed the note, Ex. A, in the bank while I was present, and as I recollect it I went down with him to the International hotel, and in the parlors of the hotel, Mrs. McCarthy signed the note and mortgage at the same time; that was the note and mortgage of 1891, first mortgage. The plaintiff in this case has paid large amounts of taxes in this county for themselves and non resident clients for the last four or five or six years; and I have attended to that business largely personally. Have done some of it.

Q. You know that on the 16th of February, 1900, that
634 any tax prior to 1896, if paid as a direct payment, that the penalty and interest would be remitted?

A. I knew there was a time when that could be done.

Q. It still continues down to the present time?

A. I think not.

Q. It continued down to February 16, 1900?

A. I don't remember whether it had been started at that time.

Q. Don't you know that that rule or provision was in force at the time you took this tax sale certificate?

A. No.

Q. You kept yourself posted on the tax rules of this county?

A. Pretty well.

Q. And if there was such a rule to accept taxes at their face value, and remitting penalty and interest, you would have known it at that time?

A. I think I would.

I do not know how much time was spent by Judge Gardner in looking this matter up at the treasurer's office and getting this tax title. I believe there was a tax deed issued on this certificate of sale.

pursuant to it; that was received from the treasurer of this county by the bank; I believe that deed was placed on record and we still have it in our possession; and it was on that tax deed—the action brought by the First National Bank against Patrick B. McCarthy and Maggie McCarthy, the defendants herein, the complaint of which was verified on the 30th day of June, 1898, was brought under and pursuant to that tax deed; I verified the complaint in that action and my signature appears on the verification.

Q. You stated a moment ago in your direct examination that these taxes were paid to protect the mortgage security?

A. Yes, sir.

Q. What — the purpose of bringing the tax deed, then, can you explain to the jury?

A. We did it on the advice of the attorney.

Q. It was brought for the purpose of putting Mr. McCarthy out of possession of the property?

A. Yes, sir.

Redirect examination:

I think we paid all these taxes, paid them under the advice
635 of our attorney, Mr. Gardner. I don't recollect whether Judge Gardner came down with the money himself and paid them and took the receipts; they were paid strictly under our direction, and did it in the manner and way he directed.

Q. This action was brought by whom for the purpose you have mentioned of protecting the mortgaged property, by him?

A. It was. I did not at any time fix the rent per month that Keenan was to pay McCarthy; I did not at any time reduce the rent on my own account, or at all; I simply did as McCarthy directed me, and applied it on his interest.

Recross-examination:

Q. At the time of the payment of these taxes, Judge Gardner, I think—Mrs. Gardner was one of the directors and stockholders of the plaintiff bank, was she not?

Objected to by plaintiff as not proper cross-examination and not the best evidence. Objection sustained to which defendants excepted.

Q. Mr. Somers, I call your attention to the defendants' Ex. 8, being a promissory note dated January 19, 1889, for $400.00 payable to the First National Bank of Rapid City, South Dakota, with interest at 18 per cent per annum from date until paid, executed by P. B. McCarthy & Company, can you by reference to your records ascertain what the consideration of that note was or whether it was given for interest or on a prior indebtedness?

A. I presume so.

Q. Will you examine your records and trace it back to its original inception?

A. That is a renewal of a $423.00 —, $23.00 being paid in cash as interest.

Q. Now, Mr. Somers, would you trace back the $423.00 note to

its inception, and ascertain what the consideration was and whether it was for interest or prior indebtedness?

A. That was made up of the notes for $16.85 and some interest, and the Somerod note and the Jennie Franklin note, making $318.15, and Mr. McCarthy by credit for the difference.

Q. What was the difference?

A. $104.85.

636 Q. Please turn to the place in the ledger where this credit is given?

A. On December 19, 1888, McCarthy had credit for $423, and out of that was paid this item of $318.15.

Q. He took up that paper to the amount of $318.15?

A. Yes, and credit for the new note.

Q. I now call your attention to defendants' Ex. 9, being a note for $100, executed November 17, 1888, payable four months after date, with interest at eighteen per cent per annum, executed by P. B. McCarthy and M. McGuire, you can trace that note to its original source, and state whether it was given for accrued interest on other obligations?

A. I think so.

Q. Please do so?

A. I should judge that is a new note as I don't find anything paid on that date.

Q. I now call your attention to defendants' Ex. 10, being a note dated November 17, 1888, for $100, payable four months after date, interest at 18 per cent per annum, and signed by P. B. McCarthy & Company, can you trace that note to its origin and ascertain for what purpose that note was given, or what the consideration of the same was?

A. It must be a new note as nothing was paid that day.

Q. Now, I will ask you, Mr. Somers, if exhibits 8, 9 and 10, being the last exhibits referred to, were not interest notes, and given to take up accrued interest on other obligations of Mr. McCarthy?

A. No, sir, the evidence that I have already given shows that they were not.

Q. They were new notes?

A. Yes, sir.

Q. What is there in your record to show that these two notes, exhibits 9 and 10, were not given as interest notes?

A. I find that by looking at our bills payable book, there was nothing paid on that day except $400, which was the renewal of the $423 note.

Q. Is it not a fact and has it not been demonstrated in this investigation today that notes were given and credits made at a later and different date in your bills payable?

A. The note is not always entered up on the book the same 637 day it is given.

Q. And where a new note is given to represent accrued interest the accrued interest or credit is not always carried out on the record the same day?

A. I think it would be made on that day in case of interest payment.

Q. Were you present in the court room when Mr. Halley was examining the records and especially with reference to a note made on September 11, and the record was made some four days later?

A. Yes, I was present.

Redirect examination:

I have referred to this Burch note and Somerod note and Jennie E. Franklin note making $415, were paid by Mr. McCarthy in this note for $323, and he was given credit for the difference; the note was $400. That $400 note is a part of this $5,000 note of May 22, 1889, also this new note of $100 dated November 17, I think it is Ex. 9, that also is a part of the $5,000 note; also the other $100 note, Ex. 10, which is also a new note, and the other $100 note, whereby we make the $5,000 note.

Q. And the George H. Riley note of $105 also went to make up that indebtedness; what is the date of that Riley note of $105, Mr. Somers?

A. September 7, 1888.

Q. Please refer to your record and find the first inception of that note; when the first money was paid out of the bank on that note or its antecedent made?

A. The record shows that on September 7, 1888, the note was discounted by P. B. McCarthy & Company and endorsed by them and turned into the bank.

Q. Then on that day you paid Mr. McCarthy the net proceeds on that note, did you?

A. Yes, sir.

That note was paid on July 3, 1889. The day the $400 note, the two $200 notes and the $4,000 note were all paid, and the Riley note and the note for $5,000 were given. Our books, according to our system of bookkeeping, shows that these notes all went into the $5,000 note; the note was held until July 3 for Mr. Tighe's signature, and then the entry was made in this book. The Riley note has never been paid to the bank in cash, but has been following along in this note, and was included in Ex. E in the mort-
638 gage deed.

Cross-examination:

Q. Will you kindly turn to your records of showing the giving of a note of January 24, 1888, for $4,000; read into the record, Mr. Somers, the history of that note.

A. There are two of them.

Q. The $4,000 note, giving the headlines, &c.?

A. When received, January 25, 1888; makers, P. B. McCarthy, M. McGuire, D. J. Tighe; where payable, Rapid City; date, January 24, 1888; time, ninety days; when due, April 23, 1888; rate of interest, 18 per cent; interest or discount it is called here, $180; net amount, $4,000; total amount paid, $4,180; date paid, April 23, 1888.

Q. Turn to the date of April 23, 1888, and see if there is a $4,000 note of that date?

A. Yes, sir.

Q. Give the record or history of that note into the record?

A. When received, April 23, 1888; makers, P. B. McCarthy, M. McGuire, D. J. Tighe; where payable, Rapid City; date of note, April 23, 1888; time 90 days; when due, July 22, 1888; rate of interest, 18 per cent; interest paid $212; net amount of note $4,000; amount paid, $4,212; when paid August 11, 1888.

Q. Now, Mr. Somers, in answer to a question propounded to you on yesterday, whether or not Mrs. William Gardner was a vice president of the bank on the 23d day of March, 1898, you could not answer the question without referring to your record?

A. The stock record book shows that Mrs. Charlotte Gardner sold her stock in the bank November 18, 1898, and she was elected vice president in January of that year, and was vice president to the time of the selling of her stock.

Q. And was vice president on the 23d day of March, 1898?

A. Yes, sir.

Redirect examination:

Q. In his opening statement Mr. Brown stated that in tracing these two $100 notes down you found they were original notes, did you so state?

A. No, sir.

Plaintiff rests.

639 PATRICK B. MCCARTHY, produced and sworn as a witness on the part of the answering defendants, testified as follows:

Direct examination:

My name is Patrick B. McCarthy; I reside in Rapid City, Pennington county, South Dakota, and have resided there since the 4th of April, 1877. The first year I was engaged in mining, on the 9th of August, 1878, I engaged in the liquor business. And since that date have been engaged in the hotel business, running the International hotel in Rapid City, the same being the mortgaged premises referred to in the pleadings in this action. Have resided in this hotel building since the 9th of August, 1878. It was converted into a hotel in 1879 or 1880. The building on the corner known as the hotel and dining room was erected when I came to Rapid City. I built the adjoining room known as the bar room later on in 1879 or 1880. That building that stands on the corner near where the tree is on Main street was on this lot. I had it moved, it was used for a time as county offices. Later on I built that addition that fronts on Sixth street, some time in the 1880's. I think it was in 1885 and finished in 1886. I am a married man; my family consists of a wife and three children. These premises are my homestead used and occupied by myself and family since the 12th day of October, 1886, and I am still residing there and have no other home. I am acquainted with Mr. Halley and Mr. Somers. I have known

Mr. Halley since 1878 or 1879 when he was in Deadwood; have known Mr. Somers since he came here in the 1880's. I am acquainted with Michael McGuire and Dennis J. Tighe. Have known McGuire since 1877, and have known Tighe since he came into the country, I think in the year 1880. There was a time when McGuire and Tighe were running the International hotel with me as partners under the firm name of P. B. McCarthy & Company; the partnership began on the 1st day of January, 1888, and ended on the 31st day of December, 1890, it was for three years.

Q. Do you know the origin and inception of the indebtedness and notes described in the plaintiff's supplemental complaint being a note of July 22, 1891?

A. Yes, sir.

649 Q. The $5,000?

A. Yes, sir.

Q. Mr. McCarthy I hand you Exhibit 1, purporting to — a $4,000 note of August 7, 1888, and will ask you if you are acquainted with the signatures on that note or ever seen it before?

A. Yes, sir.

Q. By whom is that signed?

A. P. B. McCarthy & Company, P. B. McCarthy, M. McGuire and D. J. Tighe.

Q. By whom is the signature of P. B. McCarthy & Company written?

A. By me.

Q. Now look at the exhibits two to five, inclusive, and state by whom those notes are signed?

A. Signed by P. B. McCarthy.

Q. And each for $1,000? Now, Mr. McCarthy what relation, if any, or connection is there between the note of July 22, 1891, for $5,000 described in the supplemental complaint, and the $4,000 note of August 7, 1888?

A. It is a renewal of that note given then.

Q. And what explanation can you give the jury as to the difference in amount of the two notes, the last one is for $5,000, and the one of August 7, 1888, for $4,000?

A. The difference in the size between the two notes is caused by the usurious interest on the $4,000 note, accumulating up to that time.

Q. Now, Mr. McCarthy, what connection or relation is there between the $4,000 note of August 7, 1888, and the four notes each for $1,000 of August 22, 1887, signed by you and identified by you as exhibits two to five, inclusive?

A. That note is a direct renewal of these four notes. I can state more fully if the jury wish.

Q. Make your statement?

A. About that time I was indebted to the First National Bank because of the building of the addition of the hotel and the purchase of some very costly bar furniture, and as stated by Mr. Halley yesterday, he was jogging me up to make payments of this indebtedness, and I conceived the idea that if I could get more assistance

with me, it would be beneficial to me in paying off my indebtedness to the First National Bank, and on that theory I spoke to Mr. McGuire. I will further state that I was in the liquor business with McGuire in 1879 and 1880, and that being acquainted with
641 the people, he would assist me, and I spoke to him as Mr. Halley was crowding me for money, and if I could get some assistance to reduce expenses and bring some more trade to the hotel, I might be able to pay up quicker, and the result of that was the co-partnership of P. B. McCarthy & Company, comprising myself, Michael McGuire and Tighe.

Q. You heard Mr. Halley's testimony yesterday that the note of August 7, 1888, was a renewal of a note of April 22, 1888, for the same amount, and that was a renewal of January 24, 1888; that was right?

A. Yes, sir.

Q. And that note of January 24, 1888, as stated by Mr. Halley, was the first time that McGuire and Tighe figured in the transaction?

A. Yes, sir.

Q. Now at the time that the $4,000 note of January 24, 1888, was signed by yourself, McGuire and Tighe, what indebtedness did you owe the bank at that time?

A. $4,000.

Q. Evidenced by the four notes Exhibits two to five, inclusive?

A. Yes, sir, of $1,000 each.

Q. And some interest?

A. Yes, some usurious interest at the time.

Q. You mean interest exceeding 12 per cent?

A. Yes, sir.

Q. Now on January 24, 1888, when McGuire and Tighe went into that hotel business with you one of your $1,000 notes was overdue?

A. Yes, sir.

Q. And the second was just about coming due?

A. Yes, sir.

Q. And the other two were due nine months and twelve months from their date?

A. Yes, they were due three, six, nine and twelve months.

Q. Now, who was the principal in this $4,000 note of August 7, 1888, which is signed by yourself, McGuire and Tighe?

A. I was the principal.

Q. In what capacity, if you know, did McGuire and Tighe sign that note of January 24, 1888, for $4,000?

642 A. In the capacity as sureties with me.

Q. Who was the principal in the first McGuire and Tighe note of January 24, 1888, for $4,000?

A. I was.

Q. And in what capacity did McGuire and Tighe sign that note?

A. As sureties with me.

Q. Who was the principal, Mr. McCarthy, in all of the other renewals; if they were renewals, of the $4,000 note of January, 1888?

A. I was the principal.

Q. And all the subsequent notes after the $4,000 note of January 24, 1888, that were signed by McGuire and Tighe or by either of them, you were the principal in all of these?

A. Yes, sir.

Q. And all of the notes subsequently to the first McGuire and Tighe note of January 24, 1888, was signed by McGuire and Tighe in what capacity?

A. As sureties with me.

Q. I will ask you in that connection if January, 1888, at the time you were forming or contemplating forming a co-partnership with McGuire and Tighe, you requested Mr. McGuire to go and see Mr. Halley with reference to this indebtedness?

A. Yes, sir.

Q. What were the relations between you and Mr. Halley at that time?

A. They were a little strained because he was dunning me up for money.

Q. One of your notes was overdue?

A. Yes, sir.

Q. At that time only this first note, this first ninety day note of $1,000 given August 22, 1887, had become due, had you up to January 24, 1888, renewed extended or secured it?

A. No, sir.

Q. Until McGuire and Tighe came in on the note?

A. Yes, sir, there was no mortgage given at that time nor no other security.

Q. I notice Mr. Halley has endorsed an interest payment on that note, had you been able to make any other payments on it up to that time?

A. Not that I remember of.

Q. What was Halley saying or doing along in January, 1888?

643 A. He said I would have to make some provisions to take up these notes or get some money.

Q. He demanded that you make the paper good?

A. Yes, sir.

Q. Now I will ask you if on or about January 24, 1888, when you formed that co-partnership with McGuire and Tighe, you held a certain note of McGuire for $5,333.33, secured by a mortgage upon a half interest in the International hotel property?

A. Yes, sir.

Q. Did you hold a like note of Dennis J. Tighe?

A. Yes, sir.

Q. Now, on January 24, 1888, when the first renewal of the four notes of $1,000 each was given with McGuire and Tighe as signers on it, state if you turned over to the bank any security in the form of collateral, and if so, what was it?

A. I turned over the two notes given to me by McGuire and Tighe, Mr. Halley demanded them and I turned them over.

Q. Afterwards did you employ me to foreclose those McGuire and Tighe mortgages?

A. Yes, sir.

Q. Along in 1895 or 1896, somewhere along there?

A. Yes, sir.

Q. Now, I will ask you where, when you undertook to foreclose the mortgage on the McGuire and Tighe interest in the hotel did you have to go to get the notes?

A. In the First National Bank.

Q. And had been there since January 24, 1888?

A. Yes, sir.

Q. And had been there as security for the payment of this $4,000 indebtedness evidenced by the four original $1,000 notes?

A. Yes, sir.

Q. You heard Mr. Halley's testimony did you not?

A. Yes, sir.

Q. And you heard his testimony as to the various notes executed by you and McGuire and Tighe since January 24, 1888?

A. Yes, sir.

Q. What were those notes given for, Mr. McCarthy?

A. For this original indebtedness and the smaller notes were given for the usurious interest on the four $1,000 notes.

Q. On the original indebtedness?

A. Yes, sir.

644 Q. Were any of them given for any other purpose?

A. No, sir.

Q. After January 24, 1888, or after August 22, 1887, did you ever borrow any other money from the First National Bank except the money that you had theretofore borrowed as represented by the four $1,000 notes?

A. No, sir, I didn't ask for any and could not get any.

Q. Then, as I understand it, all these large notes that Mr. Halley testified to were mere renewals of the notes prior to them?

A. Yes, sir.

Q. And the smaller notes were given to represent the accumulations of interest on that original indebtedness?

A. Yes, sir.

Q. Mr. Halley testified to a time when you had a $200 note in the bank there, when it came due you gave a new note for $250, I will ask you if at that time he loaned you at the time of the renewal of the $200 note, he loaned you $200 or any additional money?

A. No, sir, not a dollar.

Q. Mr. McCarthy, in the supplemental complaint, and in the seventh paragraph thereof, it is alleged, and Mr. Halley has in part testified, that on or about the 17th day of February, 1896, the plaintiff and yourself and Mrs. McCarthy had a settlement or accounting of the amount due on this indebtedness, or on the $5,000 note of July 22, state what the fact is about that?

A. Mr. Halley called me up and said I owed the bank so much money and had to make a payment on it, and he had the notes written out, and he said I had to sign those notes, and if I didn't he would foreclose the mortgage on the hotel right away, there was no accounting whatever, he had all of them made out.

Q. What did Mrs. McCarthy have to do with that alleged accounting?

A. Nothing whatever.
Q. She signed the note after you did?
A. Yes, sir, Mr. Somers brought the note down to the hotel.
Q. You had no accounting with them; she had no accounting with them?
A. No, sir.
645 Q. She had not figured up the several payments and ascertained what the balance was?
A. No, sir.
Q. And you took Mr. Halley's statement as to the amount due.
A. Yes, I had to.
Q. Now, prior to that time, had Mr. Halley threatened to foreclose that mortgage?
A. Yes, sir.
Q. Tell about that?
A. When he would take a demand on me for money, he would say you must pay some money or I will have to foreclose on you, and at one time he dared me to go out of the bank without signing a check. Whitfield said yesterday he was jogging me up. He was holding me up. He dared me to go out of the bank without signing a check, when I had my balance there he would come after it.
Q. Did you on two or three occasions make several small payments of interest at the rate of eighteen per cent per annum?
A. Yes, sir.
Q. Now at the time of that alleged accounting you know how Mr. Halley reached the result by which he claimed that there was $5,675.00 due on the indebtedness, did you take the payments and ascertain how he reached that result?
A. No, sir.
Q. Did you see his figures showing how he reached that result?
A. No, not at that time, he had it made out when I got there, and said I had to sign it or he would commence foreclosure proceedings.
Q. Up to 1893, or such a matter, Richard C. Lake was president of the plaintiff bank?
A. Up to a later time.
Q. Until Mr. Halley became president Mr. Lake was president?
A. Yes, sir.
Q. Now explain to the jury what demands Mr. Halley used to make upon you when this indebtedness was in arrears and overdue for payments on the indebtedness?
A. He would call me up or send for me, or if he met me, and he says you are indebted to this bank so much, and I want you to come up and pay some money, and I would go up or take a check with me, when I could tell how much I could pay, and sometimes I
646 would go up there and he said I would have to give a check for so much, or get a check and say I could deposit against it in a day or two.
Q. Most of the payments were what you could pay?
A. Yes, sir.
Q. Such amounts as you were able to?
A. Yes, sir.

Q. And that is the way the amount happened to be a particular amount?

A. Yes, sir.

Q. Are you acquainted with the signature of M. F. Hill?

A. Yes, sir.

Q. Who was M. F. Hill?

A. After the copartnership expired times were a little dull during the panic of 1892, and I thought I had better rent the hotel to somebody else and see if somebody else could not make more money out of it than I could, and I leased the hotel to M. F. Hill, and he leased the hotel in 1892, if I remember it, and run it until about the latter part of July, 1893, and then he gave up the lease and said he could not make it pay.

Q. He was leasing your hotel?

A. Yes, sir.

Q. And became indebted to you on that account?

A. Yes, sir.

Q. I hand you a paper marked Ex. 6, purporting to be an order signed by you on M. F. Hill, of date December 12, 1892, and will ask you if that is signed by you and if Mr. Hill's signature appears there?

A. Yes, sir, that is my signature and M. F. Hill's signature.

Q. To whom did you deliver that order?

A. The bank, First National Bank.

Q. Was some $205.50 paid on that order by Mr. Hill to the bank, as testified yesterday?

A. Yes, sir.

Q. And that was paid from what account, what did you give this order for?

A. I gave it to apply the proceeds on my indebtedness to the First National Bank.

Q. Do you know whether Mr. Hill paid any other sum of money than testified yesterday on this order?

A. Yes, sir.

647 Q. How much more?

A. He paid $30 more than that $250.

Q. The order calls for $250?

A. Yes, he paid that order and some more to the bank.

Q. Then the full amount of that order was paid to the bank by Mr. Hill?

A. Yes, sir.

Q. Were you present when Hill paid the other thirty?

A. No, but he told me he paid it.

Defendant moves to strike that out. Motion granted.

Q. Do you know it by Hill telling you?

A. That was my recollection of it at the time. Mr. Hill is 135 miles from Sturgis or he would be here.

Plaintiff moves to strike that out. Motion granted.

To which ruling of the court defendants duly excepted.

Q. Did you issue a subpœna for Mr. Hill?

A. No, I sent up word for him and they said they could not get him for four or five days.

Q. There was a subpœna issued here?

A. I don't know.

The defendants now offer in evidence Ex. 1, being note for $4,000, dated August 7, 1888, due ninety days after date, with interest thereon at the rate of eighteen per cent per annum; also the four notes, each for $1,000, dated August 22, 1887, due in three, six, nine and twelve months after date, respectively, and being marked by the stenographer for identification, exhibits two, three, four and five; also Ex. 6, being the Hill order referred to in the evidence.

Copies of said exhibits numbered one, two, three, four, five and six, with the endorsements thereon, are hereto annexed as a part of this bill.

Q. Now, Mr. McCarthy, I notice you say in the Hill order, pay to the bank two hundred and fifty dollars due on account, that is the account due you for rent from Mr. Hill?

A. Yes, sir, that was due me from Hill.

Q. Was it then due you from Hill?

A. Yes, sir.

648 Q. For rent of the hotel?

A. Yes, sir.

Q. Before leaving this Hill matter, you have referred to another order except this, have you any recollection of giving the bank or Mr. Halley another order on Mr. Hill for rent?

A. Yes.

Q. Have you that order now?

A. No, sir.

Q. What kind of an order was that?

A. A general order to pay to Mr. Halley the rent of the International Hotel prior to the time I went down to the Springs to visit Mrs. McCarthy's folks.

Q. That was in 1893?

A. Yes.

Q. And the general order on Hill was before that time?

A. Yes, sir.

Q. Do you know what was done if anything under that general order?

A. I don't remember how many payments were made under that order, but Mr. Halley wrote me while down at the Springs?

The plaintiff objects to anything he wrote unless he produces the letter. Objection sustained.

Q. Have you got the letter?

A. No.

Plaintiff further objects as hearsay. Question withdrawn.

To which ruling of the court the defendants duly excepted.

Q. To your knowledge did they make demands on Hill for rent?

A. Yes.

By Mr. WHITFIELD:

Q. How do you know?
A. I was present.
Q. When?
A. In the bank during the summer of 1893.

By Mr. BROWN continuing the examination of witness:

Q. While down there Mr. Halley wrote you a letter?
A. Yes, sir.
Q. You stated Mr. Halley made demands on Mr. Hill for rent, what was the result of these demands?
A. He said he could not pay the rent and pay the expenses, and he gave up the hotel; he said Halley made too many demands on him for the money, and he could not meet them and he had to get out and give it up.

649 Q. Mr. McCarthy, was there a time in 1890 that William Franklin and Jennie Franklin, or Jennie Franklin, became indebted to you for board?
A. Yes.
Q. Therefore furnished by you to them?
A. Yes, sir.
Q. Did they become indebted to P. B. McCarthy & Company?
A. Yes, sir.
Q. And you afterwards sued for that and got judgment?
A. Yes.
Q. Now, (referring to the original complaint in that case) that is your signature?
A. Yes, sir.
Q. And Mr. Coad was your attorney at that time?
A. Yes, sir.
Q. And the complaint was sworn to away back in 1890, in July?
A. Yes, sir.
Q. And the suit slumbered along, and nothing was accomplished with that suit until the term when we got judgment in March, 1895?
A. No, sir.
Q. The suit was on the calendar here term after term was it not?
A. Yes, sir.
Q. Now, calling your attention to Ex. 7, that P. B. McCarthy & Company by P. B. McCarthy, was signed by you?
A. Yes.
Q. And acknowledged before me as notary public?
A. Yes, sir.
Q. I will ask you if that assignment was made the same day the judgment was signed and filed in that case?
A. Yes, sir.
Q. Which shows on the face of it here?
A. Yes, sir.
Q. At whose suggestion was it, and how did you come to make that assignment to Mr. Halley?
A. At the suggestion of yourself as attorney.

Q. Why did you make such a quick assignment of that judgment to Mr. Halley for the bank?

A. The suit was brought in the name of P. B. McCarthy & Company and I made it so it would apply on my indebtedness to the bank or the indebtedness which had been P. B. McCarthy & Company which I assumed later on and so McGuire and Tighe could not get it.

Q. You were the surviving partner of the firm?

A. Yes, sir.

650 Q. In March, 1895, when this assignment of the judgment was made the old firm of P. B. McCarthy & Company was dissolved?

A. Yes, sir.

Q. By limitation?

A. Yes.

Q. January 1, 1891?

A. Yes, sir.

Q. And in obtaining that judgment and in prosecuting your suit, you carried it on as one of the surviving partners in the firm's name?

A. Yes, sir.

Q. Who prepared this assignment of judgment?

A. Mr. Brown.

Q. What was done with it after I prepared it?

A. It was taken up to the First National Bank and agreed there between Mr. Halley, myself and Mr. Brown, I think you were present, that it would be turned over to the bank less Mr. Brown's attorney's fees.

Q. And the costs of the sale in the case?

A. Yes, sir.

Q. Now I will ask you if while I was writing that assignment or before we made it out in the name of Mr. Halley you went up to see Mr. Halley about paying some attorney's fees to me and some costs of sale out of the judgment?

A. Yes, sir.

Q. And then we went up there and it was delivered to Mr. Halley?

A. Yes, sir.

Q. The full amount of that judgment was collected, was it not?

A. Yes, sir.

Q. And Mr. Halley paid out of it what, if you know; he paid me how much?

A. $150.

Q. And that was attorney's fees in this case and the suit against McGuire and one against Tighe?

A. Yes, sir, $50 in each case.

Q. And Mr. Halley found fault with that charge?

A. Yes, sir, he said you held him up.

Q. Halley paid some costs out of this?

A. Yes.

Q. And we sent them to him for payment?

A. Yes, these items were sent to him for payment.

Q. Are you entitled to a credit to the full amount that Mr. Halley credits you with there, are you not?

A. Yes, sir, I think it was $517, as I remember it, but he figured it $500, I figured it $517.

651 Q. Now, Mr. Halley credits you with $500.95, interest on that judgment, are you entitled to at least that credit?

A. Yes, sir.

Q. Was anything ever paid by you to Mr. Halley that should be applied upon interest?

A. No, sir.

Q. Was anything ever said to you at any time by Mr. Halley or any officer of the bank, that either the Franklin judgment item or the Hill order or orders should be applied upon interest?

A. No, sir.

Q. Did Halley or any officer of the bank ever say anything to you before the first trial of this case about applying those items upon interest?

A. No, sir.

Q. And you never gave any such direction to that effect?

A. No, sir, I never did.

Q. And in the case of this judgment you made out your assignment and had an understanding with Mr. Halley that he should pay a certain attorney fee and the costs of sale?

A. Yes, and to apply the balance on my indebtedness.

Q. Was there a time when Tom Tracey and Charley Seip rented a room in the International hotel?

A. Yes, sir.

Q. And became indebted to you for rent?

A. Yes, sir.

Q. What year was that in?

A. 1893 or 1894.

Q. Was there a time that you gave the bank or Halley an order on them for $30, or any other sum?

A. Yes, sir.

Q. Have you that order now?

A. No, I think not.

Q. Do you know where it is?

A. No.

Q. Was any money paid by Seip or Tracey to the bank for you?

A. Yes.

Q. How much?

A. Two months' rent at $15 a month was paid to the bank for me.

Q. Were there any other payments?

A. No other Tracey or Seip payments that I know of.

Q. Now at the time that you gave the order to the bank on

652 Mr. Keenan to pay rent, what rent at that time was Mr. Keenan paying you for those rooms in the International hotel on Sixth street?

A. $60 per month.

Q. At the former trial did you hear a statement by Mr. Halley or Mr. Somers, or at this trial, about that rent having been reduced?

A. Yes, sir.

Q. Did you hear Mr. Somers' statement yesterday that the rent was so reduced by your permission or with your consent?

A. Yes, sir.

Q. What is the fact as to that?

A. It is false; I didn't know the rent was reduced until I went to see how much Halley had collected, and I asked Mr. Halley there who did this; and he said you owed this bank money and I had to get it out of you, and they would not pay any more, and I had to reduce it.

Q. After six months did you consent to the reduction of the rent from $60 to $40 a month?

A. Never did.

Q. Did you afterwards consent for the rent to be reduced from $40 to $25?

A. Never did.

Q. That was practically an arrangement between the bank or its officers and Mr. Keenan?

A. Yes, sir.

Q. Out of the amount that became due from Mr. Keenan to you on rent, was there deducted by Mr. Keenan a bill that he claimed to have against Tighe for some $255.60?

A. Yes, sir.

Q. And what you are entitled to as a net credit is the amount of the rent they paid to the bank less that $255.60?

A. Yes, sir.

Q. You are entitled to a credit of what became due on the rent less that $255.60?

A. Yes, sir, while they were in there and after I gave the order.

Q. I will ask you, Mr. McCarthy, (referring to paper marked Ex. 11 for identification at the former trial of this action) you had a memorandum purporting to be certain payments made to the bank by P. B. McCarthy, and it was referred to by you when you gave your testimony in this case?

A. Yes, sir.

Q. That was marked by Mr. Grantham, the stenographer at that time?

A. Yes, sir.

653 Q. Those payments shown on that paper you took from what record, if any, at the time?

A. From cash book and expense book at that time.

Q. Did you have that cash and expense book in the court house and was it referred to at that trial?

A. Yes, sir.

Q. Where is it now?

A. I don't know. I lost some checks and some books since that time. I put them in a satchel and took them up stairs when I was cleaning house, and I can't find them.

Q. Have you made a careful search for that book?

A. Yes, sir.

Q. State to the jury, Mr. McCarthy, if at the time of the last trial

when you had your books there in court, you knew the statements in the Ex. 11 to be correct?

A. Yes, sir.

Q. Mr. McCarthy, I call your attention to what appears to be a shorthand note down here at the bottom, you had nothing to do with them?

A. No, sir.

Q. Otherwise the paper is in the same condition it was then?

A. Yes.

Q. And is it in your handwriting and figures, all of it?

A. Yes, sir.

Q. And can you now, refreshing your recollection from that exhibit, testify to these items?

A. Yes, sir.

Q. I will ask you if you have a check dated March 1, 1888, for $203.00, in your possession?

A. Yes, sir.

Q. To whose order is it?

A. Order of the First National Bank.

Q. Dated when?

A. Rapid City, March 1st, 1888, No. 43.

Q. And you brought the other checks with you given to the bank?

A. Yes, sir, I have.

Q. On this indebtedness that you owed them or on account of it?

A. Yes, sir.

Q. Speaking generally, do some of these checks show on their face that they were for interest?

A. I have some that show that they were for interest.

Q. What was this payment of March 1, 1888, for $203,
654 what was it on and you gave it to be made how?

A. It was given on the indebtedness.

Q. Did you say anything to the bank at that time as to the application of it?

A. Yes, I told them to place it to my credit on my indebtedness.

Q. Did you ever give them any direction to apply it on interest?

A. No, sir.

Q. To whose order is it?

A. Is signed by P. B. McCarthy, by P. B. McCarthy to the First National Bank.

Q. The first one is the company's check by Tighe?

A. That is marked Ex. 13.

Q. For what was this check of $180 given?

A. To be applied on the indebtedness.

Q. And an application of that on interest?

A. Yes, I said to apply on the indebtedness and not on the interest?

Q. Did you give any direction to apply it on interest?

A. No, I did not.

Q. Have you a check there dated August 11, 1888, for $217?

A. $217.10; yes, sir.

Q. By whom is that signed?
A. P. B. McCarthy & Company, in my handwriting.
Q. And payable to whom?
A. First National Bank of Rapid City, this is marked Ex. 14.
Q. That was given on this same indebtedness?
A. Yes, sir.
Q. Was there any directions to apply it on interest?
A. No, sir.
Q. Have you a check there of August 6, 1888, for $231.81?
A. Yes, sir.
Q. By whom was that signed?
A. P. B. McCarthy.
Q. Whose order is it payable to?
A. To the order of the First National Bank, marked Ex. 15.
Q. And is this on the same indebtedness?
A. Yes, sir.
Q. Any direction given to apply it on interest?
A. No, sir.
655 Q. Have you another check there of date August 6, 1888, for $76.13?
A. Yes, sir.
Q. To whom payable?
A. To the First National Bank, marked Ex. 16.
Q. That is on this same indebtedness?
A. Yes, sir.
Q. Any direction given to apply it on interest?
A. No, sir.
Q. Have you a check there of date August 10, 1888, for $275.50?
A. Yes, sir.
Q. It is signed by whom?
A. P. B. McCarthy.
Q. Payable to whom?
A. First National Bank of Rapid City.
Q. Is that on this same indebtedness?
A. Yes, sir.
Q. Any direction given to apply it on interest?
A. No, sir.
Q. Have you a check there of date October 6, 1888, for $609?
A. Yes, sir.
Q. That is signed by whom and payable to whom?
A. By P. B. McCarthy & Company.
Q. By whom?
A. I made the check.
Q. It is your handwriting?
A. Yes, sir.
Q. To whom payable?
A. First National Bank of Rapid City.
Q. Is that on this same indebtedness?
A. Yes, sir.
Q. When you say the same indebtedness you mean the principal of $4,000?

A. Yes, sir.
Q. Was any direction given to apply that on interest?
A. No, sir, marked Ex. 18.
Q. Have you a check there of November 9 for $100?
A. Yes, sir.
Q. Made by whom or signed by whom?
A. Made by me and signed by P. B. McCarthy & Company.
Q. And payable to whom?
A. First National Bank of Rapid City.
Q. Is that on this same indebtedness?
A. Yes, sir.
Q. Any direction given to apply on interest?
A. No, sir, marked Ex. 19.

Q. Have you a check there dated December 19 for
656 $318.15?

A. Yes, sir.
Q. Who signed that?
A. Signed by me, signed by P. B. McCarthy & Company by P. B. McCarthy.
Q. Payable to whom?
A. First National Bank of Rapid City.
Q. Was that on this same indebtedness?
A. Yes, sir.
Q. Was any direction given to apply it on interest?
A. No, sir, marked Ex. 20.
Q. Have you a check there of January 18, 1889?
A. Yes, sir.
Q. $29.25?
A. Yes.
Q. Signed by whom?
A. P. B. McCarthy & Company in my handwriting.
Q. Payable to whom?
A. First National Bank of Rapid City.
Q. Was that on the same indebtedness?
A. Yes, on the same indebtedness.
Q. Any direction given to apply it on interest?
A. No, sir, this check was made out on the bank and was not one of my own checks. It was made out there when Mr. Halley called me up there to pay him money, marked Ex. 21.
Q. Most of them were what?
A. My private checks.
Q. Have you a check there of February 6, 1889, for $180?
A. Yes, sir.
Q. Signed by whom?
A. P. B. McCarthy & Company by McCarthy.
Q. Payable to whom?
A. First National Bank of Rapid City.
Q. Was that on this same original indebtedness?
A. Yes, sir.
Q. Any direction as to its application on interest?
A. No, sir. This is another check made out at the bank by me for to pay the First National Bank. I think it was the check that

Mr. Halley said I dared not go out of the bank unless I signed it, marked Ex. 22.

Q. He said if you went out without signing it he would foreclose the mortgage?

A. Yes, sir.

657 Q. Have you a check there of November 27, 1889, for $250?

A. Yes, sir.

Q. Signed by whom?

A. P. B. McCarthy & Company by McCarthy.

Q. Payable to whom?

A. First National Bank of Rapid City.

Q. Was that to apply upon this indebtedness?

A. Yes, sir.

Q. Any direction as to applying that on interest?

A. No, sir, marked Ex. 23.

Q. Have you a check there of March 22, 1890, for $200?

A. Yes, sir.

Q. That was signed by whom?

A. P. B. McCarthy & Company by McCarthy.

Q. Payable to the bank?

A. First National Bank of Rapid City.

Q. Was that to apply on this indebtedness?

A. Yes, sir.

Q. Any directions given as to the application of interest?

A. No, sir, marked Ex. 24.

Q. Have you also a check there dated June 5, 1890, for $100?

A. Yes, sir.

Q. Signed by whom?

A. A. P. McCarthy & Company by McCarthy.

Q. Payable to whom?

A. First National Bank of Rapid City.

Q. Is that to apply on this same indebtedness?

A. Yes, sir.

Q. Any directions given as to the application of it on interest?

A. No, sir.

Q. Now, Mr. McCarthy, I will ask you if you did have a check at the time of the last trial dated September 30, 1890, for $200 now lost?

A. I had a check but I don't know as I had it at the time of the last trial. I had it during this trial, and mislaid it somewhere.

Q. You had it a day or two ago?

A. Yes, sir. I did.

Q. You made a list of the checks, including that check before you lost it?

A. Yes, sir.

Q. That was made by whom?

A. By me for P. B. McCarthy & Company.

Q. Payable to whom?

A. First National Bank of Rapid City.

Q. To apply on this indebtedness?

A. Yes, sir.

658 Q. Any directions given as to applying it on interest?
A. No, sir.

Q. Referring to the check that you voluntarily spoke about a moment ago, check Ex. 21, January 18, 1889, $29.25, is there any explanation you want to make?

A. When I had this check I noticed there was a mark on it, and I see there is $6.25 subtracted from $29.25 leaving a balance of $23. The way it is here this check, after I left the court house and went to the hotel, this check includes a payment made on principal and a payment on interest. The principal is $23 and the balance paid on interest.

Q. What makes you think so?

A. It is marked here. That is my best recollection of it, that is $23 on principal and the balance on interest.

Q. Those lead pencil notations are not yours?

A. No, but they were put down at the time.

Q. Now, I notice, Mr. McCarthy, on these checks or nearly all of them, the paying stamp of the bank, were they all paid and charged to your account?

A. Yes, sir.

Q. Now, Mr. McCarthy, I will hand you the paper or memorandum marked Ex. 11, and which you identified before dinner, and stated that you had at the former trial, and which you knew to be correct, and see if *three* are other items of payment, state if on September 30, 1891, you paid the bank $75.

A. Yes, sir.

Q. Was that to apply on this indebtedness?

A. Yes, sir.

Q. Anything said as to the application of that on interest?

A. No, sir.

Q. I will ask you if on October 22, 1891, you paid $10.50?

A. Yes, sir.

Q. Was that to apply on this indebtedness?

A. Yes, sir.

Q. Was there any direction as to the application of it on interest?

A. No, sir.

Q. State if on October 29, 1891, you paid $178.95?

A. Yes, sir.

Q. Was that to apply upon this indebtedness?

659 A. Yes, sir.

Q. Was there any direction to apply it upon interest?

A. No, sir.

Q. Did you on December 30, 1891, pay to the bank $41.30?

A. Yes, sir.

Q. Was that to apply on this indebtedness?

A. Yes, sir.

Q. Was there any direction to apply that item on interest?

A. No, sir.

Q. Did you, on February 8, 1892, pay the bank $76.65?

A. Yes.

Q. Was it to apply upon this indebtedness?
A. Yes, sir.
Q. And any direction to apply that on interest?
A. No.
Q. Did you, on February 9, 1892, pay the bank $45?
A. Yes, sir.
Q. Was it to apply on this indebtedness?
A. Yes, sir.
Q. Any direction as to the application of it on interest?
A. No, sir.
Q. Did you on May 1, 1892, pay to the bank $29.68?
A. Yes, sir.
Q. Was that to apply on this indebtedness?
A. Yes, sir.
Q. Any direction to apply that on interest?
A. No, sir.
Q. Did you on August 9, 1893, pay to the bank $125?
A. Yes, sir.
Q. Was that to apply on this indebtedness?
A. Yes, sir.
Q. Was there any direction to apply that on interest?
A. No, sir.
Q. Did you on October 9, 1893, pay him $25?
A. Yes, sir.
Q. Was that to apply on this indebtedness?
A. Yes, sir.
Q. Any direction as to the application of that on interest?
A. No, sir.
Q. Did you on November 16, 1893, pay the bank $25?
A. Yes, sir.
Q. Was that application on this indebtedness?
A. Yes, sir.
Q. Any direction as to the application of that to apply on
660 interest?
A. No, sir.
Q. Did you on December 23, 1893, pay to the bank $20?
A. Yes, sir.
Q. Was that to apply on this indebtedness?
A. Yes, sir.
Q. Any direction as to applying it on interest?
A. No, sir.
Q. Did you on January 30, 1895, pay to the bank $30?
A. Yes, sir.
Q. Was that to apply on this indebtedness?
A. Yes, sir.
Q. Any direction to apply that on interest?
A. No, sir.
Q. Did you on November 25, 1893, pay to the bank $50?
A. Yes, sir.
Q. Was that to apply upon this indebtedness?
A. Yes, sir.

Q. Any direction as to applying it on interest?
A. No, sir.
Q. I will ask you if on July 18, 1893, you remember that you paid to Mr. Lake at Hot Springs on this indebtedness $50?
A. Yes, sir.
Q. How did that come to be paid?
A. That was during the time I had leased the hotel to Mr. Hill. My wife, family and myself were down there to spend a part of the summer with my wife's folks who were living there, and while I was there Mr. Lake came down and came to me one day and says: Mac, I have got a letter from Mr. Halley requesting more money, and I read the letter and I says: I think I have paid Mr. Halley all the money I could spare before I came down here, and I gave him a general order on Mr. Hill for rent out of the hotel and I says I could not think Mr. Halley would be so hard on me when I am giving him up everything I can, and he says Mac we have done a good deal of business together and you have been a patron of our bank for a long time and it is not me that is crowding you, and he says, Halley says he is going to break you if he can, and I am not to blame for it, and I says what is he doing it for. And he says he is doing it because he can't use you. And I says, what have I done, what for. He says, you know more about that than I do, you
661 have been in that council frequently and matters may have come up there, and he says I wish you would give me some money so I can send it to him, and I paid him $50, all that I could spare at that time and I gave him an order for the ccnan rent at that time as I remember it.
Q. R. C. Lake was at that time president of the bank, First National Bank of Rapid City?
A. Yes, sir.
Q. Now, Mr. McCarthy, that on or about December 22, 1890, shortly before Christmas, 1890, M. McGuire paid $150 to the bank on this indebtedness?
A. Yes, sir, that was before the co-partnership had expired, and Halley, as usual, was rounding us up for money, and I says I can't get money on this indebtedness and says you give me some money and he got the money in the nature of a check.
Q. Could you find the check?
A. No, sir.

By Mr. WHITFIELD:

Q. Were you present at the conversation?
A. That was at the hotel.
Q. Were you present at the conversation?
A. No.

The plaintiff moves to strike that out.
Motion granted by the court.
To which ruling of the court the defendants at the time duly excepted.

By Mr. BROWN:

Q. That was paid on this indebtedness?
A. Yes, sir.
Q. This $150?
A. Yes, sir.
Q. You saw the check?
A. I made out the check and Mr. McGuire took it up there.
Q. That check was made to apply on this indebtedness?
A. Yes, sir.
Q. Let me ask you about that payment to Lake at Hot Springs of $50, was that to apply on this indebtedness?
A. Yes, sir.
Q. Did you say anything to Lake as to paying it on interest?
A. No, sir.
Q. He simply wanted some money to apply on this account?
A. Yes, sir.

662 Q. Was there a transaction January 13, 1890, by which you sold lots one to six of block 66 of the original townsite of Rapid City?

A. Yes, sir.
Q. How much did you get for these lots, if you know?
A. $800.
Q. For your interest?
A. They were all mine, from one to six inclusive.
Q. You got $800?
A. Yes, sir.
Q. What did you do with the money?
A. I didn't get the money.
Q. What was the transaction?
A. Richard C. Lake, president of the First National Bank came to me and said Mac, this Rapid River Milling Company would like those lots down here if they can get them cheap, and I wanted $900 for the lots. He says that's pretty steep and if you will put them in at $800, I will give you credit for them. And I said I would like to have a little money out of them, and he says, will you take $800, and I says yes, and I told him to apply $600 of that on my indebtedness.
Q. And the bank got the $600?
A. Yes, sir.
Q. What did you do with the $200?
A. He deposited that to my credit in the bank.
Q. And you paid them to Fowler as attorney's fee?
A. Yes, and $100 more on the same day.
Q. How was the $600 to be applied, was anything said as to that?
A. To apply upon my indebtedness.
Q. Anything said about the application of that on interest?
A. No, sir.
Q. Your transaction there was with Mr. Lake?
A. Yes, sir, and Mr. Fowler was present and made out the deed.
Q. Fowler was a director in the bank at that time?
A. I don't know.

Q. Mr. Lake held some position in the Milling company?
A. I don't know, he and them got the Milling company.
Q. Was there a transaction about July, August or September, on the sale of a mine on July 3rd, 1889, was there a transaction on the sale of a mine and an item of some $60 payment?
663 A. There was a transaction of the sale of a tin mine that myself, McGuire and Challis were interested in, a sale to James Wilson at that time or about that time, and I gave an order to the First National Bank for the money to be applied on my indebtedness out of that transaction.
Q. Was the money paid to the bank?
A. It was, he never disputed it, and I understood it was paid in.
Q. How much did you get out of your interest in the mine on that sale?
A. I ought to have got about $1,250 out of it.
Q. Was Major McGuire in that deal?
A. Yes, sir.
Q. How much did he get?
A. I think he got the same.
Q. Was it collected through the bank by a draft on Wilson?
A. Yes, sir.
Q. Major McGuire knows about the transaction?
A. Yes, sir, he done the business as a partner of mine.
Q. Have you got that order or check for $600?
A. No, sir, I didn't draw no check for it.
Q. State to the jury if you or the firm of P. B. McCarthy & Company turned into the bank some notes for collection?
A. Yes, sir.
Q. What was said about the collection of that $600 on the sale of the mine, as to its application upon your indebtedness, if anything?
A. Nothing.
Q. Any direction given to apply it on interest?
A. No, sir.
Q. The money was simply to go on your indebtedness?
A. Yes, sir.
Q. What notes were there, if any, that the bank collected belonging to you, or to P. B. McCarthy & Company, and for which you claim to be entitled to credit, if any, under it of about December 19, 1888?
A. There were four notes given to McCarthy & Company for board bills and two orders and cash, which we endorsed the notes and deposited them in the bank, and enough money to make $423 on that date; one note was given by Franklin and wife for $100 and one by F. H. Clark for $100, and from Somerod, and
664 one from Burch, and two orders of $16.20. This $16.20 comprised those orders for board. Those notes were endorsed by McCarthy & Company. Now as to the Clark note one-half belonged to me and the other to McCarthy & Company. Clark boarded at my place and owed me about $50, and I turned it over to McCarthy & Company, and got the money from the firm of McCarthy & Company, and got my money from them. That note of F. H. Clark

was not paid for some time, so much so that I paid $7.35 and McCarthy & Company paid $7.35 as interest on my note, and that is not included on any of these interest accounts, and then I had to pay again the $16 and something and $10, and afterwards the note was never paid, and I had to take it up or pay it, and I gave my check to the First National Bank for $10 for this note and I had to pay the note and all of this accumulated interest.

Q. William Franklin's note was $100?
A. Franklin and wife.
Q. How much was it?
A. $100.
Q. What was the next note?
A. F. H. Clark, $100.
Q. The other, Somerod?
A. $86.65.
Q. What was the other?
A. Frank Burch.
Q. How much?
A. $16.15.
Q. That is George W. Burch?
A. It may be.
Q. Is it a man by the name of Burch?
A. Yes, sir.
Q. Now, the orders?
A. Two orders for board and lodging.
Q. How much?
A. Amounting to $16.20.
Q. Did Franklin pay his note to the bank?
A. Yes, sir.
Q. Did Somerod?
A. Yes, sir.
Q. Did Burch?
A. Yes, sir.
Q. Were the two orders paid?
A. Yes, sir, we never got them back.
Q. And the Clark note was not paid to the bank by the firm and you took it up afterwards?
Q. Yes, sir, these notes were made to P. B. McCarthy and endorsed by us.
Q. Is there anything else?
665 A. There was another one not included here, from J. J. Jewett for $23.40 or forty-five cents for board and lodging.
Q. Is that note ever paid by Jewett?
A. Yes, sir.
Q. Paid while the note was in the bank?
A. Yes, sir. That was deposited with the $76.15 mentioned in the check here. The check and Jewett's board bill made $96 but the note was made out sooner but deposited in the bank with the $79.15 and it made a total of $99 that is not in these accounts.
Q. Was that Jewett note endorsed by you when put in the bank?
A. Yes, sir.

Q. And you never had to take it up?
A. No, sir.
Q. And you never got the note back out of the bank?
A. No, sir.
Q. Now those aggregated the items of notes put in the bank $423, were they to apply on this indebtedness?
A. Yes, sir.
Q. Was any direction given by you to apply the same upon interest?
A. No, sir, there was not much interest due them.
Q. What is that note of George H. Riley and what is the transaction, it has been mentioned here in the evidence when I asked you the last question I referred to the Franklin and wife note, the Clark note, the Somerod, the Burch note and the two orders and the Jewett note, they were to apply on your indebtedness?
A. Yes, sir, but the Jewett note was not in that bunch of notes.
Q. Did you give any direction to being applied on interest?
A. No, sir.
Q. Now explain the Riley note?
A. It was for $105, given for board and lodging and endorsed by me and deposited by me in the First National Bank for collection and to be placed to my credit when collected, and by Somers' testimony yesterday it was a charge instead of a collection.

Q. Did you ever get the Riley note after it was put into
66C the bank?

A. I have never seen it.

Q. Was that Riley note put in there to apply on this indebtedness of yours?
A. Yes, sir.
Q. Did you give any direction to apply it on anything?
A. No, sir.
Q. Was it endorsed by you?
A. I think it was endorsed by me, but it may be endorsed by P. B. McCarthy & Co. It was made out to P. B. McCarthy & Co.
Q. That is your recollection?
A. Yes, sir.
Q. Now, Mr. McCarthy, you were present at the first trial of this action in April, 1897, were you not?
A. Yes, sir.
Q. Did you know before that time that Mr. Halley claimed to apply all of these payments that both sides have testified to upon interest?
A. No, sir, that is the first time I knew of it outside of this, which I gave as interest and recommended to be applied in that way.
Q. That were given as interest?
A. Yes, sir.
Q. Now, Mr. McCarthy, I will ask you if you have in your hands some checks which are marked on their face as being for interest?
A. Yes, sir.
Q. Have you there a check of November 30, 1894, for $45?
A. Yes, sir.
Q. By whom was that made?

A. By P. B. McCarthy.
Q. To whom was it payable?
A. First National Bank of Rapid City.
Q. Now I notice in this interest check known as Ex. 26, it is written in the body of it pay First National bank or bearer interest, was that in there when first written out?
A. Yes, sir, I put it there.
Q. Do you know why that was put there?
A. To show it was for interest.
Q. Have you there a check for January 25, 1888, $46?
A. Yes, sir.
Q. By whom was that signed?
A. By P. B. McCarthy & Co. by Tighe.
Q. Tighe's hand writing?
A. Yes, sir.
667 Q. To whom payable?
A. First National Bank of Rapid City.
Q. Does it say anything about interest on its face?
A. No, sir.
Q. What was it given for?
A. Given for interest.
Q. How do you know?
A. In looking up my old accounts before and in tracing it up I found it was marked on my book as given for interest.
Q. Have you a check there of April 17, 1888, for $13.75?
A. Yes, sir.
Q. By whom was that signed?
A. P. B. McCarthy.
Q. To whom payable?
A. First National Bank.
Q. What was it given for?
A. For interest, that is the time that the note for $5,000 was given, marked Exhibit 28?
Q. How do you know that was for interest?
A. In looking it up I found it the same way, and the note came due that day and I could find nothing except that it was given for interest.
Q. Have you a check there dated May 22, 1888, for $12?
A. Yes, sir.
Q. By whom signed?
A. P. B. McCarthy & Co. by McCarthy.
Q. To whom payable?
A. First National Bank of Rapid City.
Q. What was that note given for?
A. For interest, marked Exhibit 29.
Q. Have you a check there of June 17, 1888, for $7.50?
A. No, that is given for two batches of interest.
Q. Have you the check?
A. No, I have not got the check of June 17th.
Q. What is the date of the check you hold in your hand?
A. July 20th.
Q. For how much?

A. $26.80.
Q. By whom was that signed?
A. P. B. McCarthy & Co.
Q. By yourself?
A. No, this was written by Tighe.
668 Q. To whom payable?
A. First National Bank of Rapid City.
Q. What was it given for ?
A. Interest, marked Exhibit 30.
Q. Have you a check there of date September 6, 1888?
A. Yes, sir.
Q. For nine dollars?
A. Yes, sir.
Q. By whom made?
A. P. B. McCarthy & Co.
Q. Signed by whom?
A. Mr. Tighe's hand writing.
Q. To whom payable?
A. First National Bank of Rapid City.
Q. What was that given for?
A. Interest, and interest is written in the body of the check, marked Ex. 31.
Q. Have you a check of November 17, 1888, for $14.65?
A. Yes, sir.
Q. By whom made?
A. P. B. McCarthy & Co. by McCarthy.
Q. To whom payable?
A. First National Bank of Rapid City.
Q. What was it given for?
A. Interest, this $14.65 applied as interest on the two small interest notes, marked Ex. 32.
Q. Have you a check there of November 22, 1888, for $80?
A. Yes, sir.
Q. By whom made?
A. P. B. McCarthy & Co.
Q. What was that given for?
A. For interest mentioned in the body of the check.
Q. Have you a check there of December 31, 1888, for $7.35?
A. No, sir, that is mislaid.
Q. How recently?
A. I had it when I hunted up my checks and books, but it got lost.
Q. Was that payable to First National Bank?
A. I think so.
Q. Was it given for interest?
A. Yes, sir.
Q. Now you have been asked generally about these small notes that have appeared in evidence, but I think I will ask you one more specifically about them. Mention was made of a $200 note of
P. B. McCarthy & Co. of January 31, 1888, what was that
669 note given for?
A. For interest.

Q. On this original $4,000 indebtedness?

A. Yes, sir.

Q. Now mention has been made of a note of $219, dated January 24, 1888, and signed by McCarthy, McGuire & Tighe, what was that note given for, if you know?

A. Interest.

Q. Mention was also made of a $250 note of March 1, 1888, I don't remember who the signers were, what was that note given for if there was such a note?

A. Given for interest.

Q. Mention was made of one note of $400, signed by McCarthy, McGuire & Tighe, of date March 31, 1888, what was that given for?

A. Interest on the $4,000 original note.

Q. Mention was made of one for $219, dated April 12, 1888, and made by McCarthy, and McGuire, what was that note given for, if you know?

A. For interest.

Q. Mention was also made in the record here of a $300 note of July 20, 1888, signed by McCarthy & Co., and perhaps by the three individuals, also a $600 note of the same day signed by McCarthy & Co., and perhaps by the three individually, what were those two notes given for, if you know?

A. Interest.

Q. Mention was also made in the record here of a $600 note of P. B. McCarthy, of date August 7, 1888, what was that note given for, if you know?

A. For interest.

Q. When you say interest, you mean interest on the original indebtedness?

A. Yes, sir.

Q. Mention was also made of a $100 note, dated and said to be signed by McCarthy and Franklin, that is this same Franklin note you explained?

A. No, sir, that is the note of Mrs. Franklin, she got some money out of the bank and I endorsed it and she paid it.

Q. The bank never called on you to pay it on your endorsements?

A. No, sir, I remember the very day she paid it.

Q. Mention is also made in the record here of a $600 note
670 of date August 11, 1888, signed by McCarthy & Co., and I think also by McCarthy and McGuire, what was that note given for, if you know?

A. For interest.

Q. Mention was also made in the record here of a note of $105 of date September 7, 1888, signed by George H. Riley?

A. Yes, sir.

Q. That had nothing to do with this indebtedness?

A. No, sir, it was put there for collection.

Q. And if collected what was to be done with the proceeds?

A. Applied on this indebtedness.

Q. Mention has been made here on the record of a $600 — of date

September 7, 1888, signed by McCarthy & Co., what was that note given for, if you know?

A. That was given for interest.

Q. The records also tell of a $120 note made by P. B. McCarthy dated October 6, 1888, what was that note given for, if you know?

A. For interest.

Q. Mention has also been made in the record here of a $423 note of McCarthy & Co., dated December 19, 1888, for what was that note given, if you know?

A. For interest, and that $120 note was given by me individually for interest on the original $4,000, the four notes of $1,000 each.

Q. They were all given as interest on that indebtedness?

A. Yes, sir.

Q. This note of $423, for what was that given, dated December 19, 1888, if you know?

A. That was a credit comprising those notes which they charged up to us, and should have given us credit for.

Q. That is a batch of notes referred to for which you were claiming credit for $423?

A. Yes, sir.

Q. The record also spoke of a note given January 19, 1889, for what was that note given, if you know?

A. That was for interest.

Q. The note spoken of McCarthy and wife, of date January 22, 1891, which if I remember right was the date of the mortgage, for what was that given, if you know?

A. For interest.

671 Q. Then there is shown in the record here a note of $350 of date July 24, 1891, signed by yourself, for what is that note given?

A. For interest.

Q. There is also shown in the record here a smaller note and a smaller amount signed by McCarthy and wife?

A. That was given for interest.

Q. The record shows the note for $675, signed by P. B. McCarthy and wife of date February 17, 1896, for what was that note given, if you know?

A. That was given for interest.

Q. All of these smaller notes were given to represent interest and charged up on the original loan?

A. Yes, sir, I never got a dollar from the bank after the original loan.

Q. And the $5,675 that the bank claimed to be due in February, 1896, is made up of the original $4,000 note and the interest then claimed to be in arrears, is that right?

A. Yes, sir.

Q. Now, Mr. McCarthy, mention was made on the examination of Mr. Somers yesterday of Exhibits 9 and 10, as marked by the stenographer, two notes dated November 17, 1888, each for $100 and

signed by P. B. McCarthy & Co., now I will ask you what those notes were given for, if you know?

A. Those notes were given for interest.

Q. On the original $4,000 indebtedness?

A. Yes, sir.

Q. Now I also notice a note of $400, of date January 19, 1889, that was referred to yesterday, signed by McCarthy & Co., and Ex. 8, I will ask you what that was given for, if you know?

A. That was given for interest also.

Q. Interest on what?

A. On the original indebtedness.

Q. I notice also here, Mr. McCarthy, two notes of date May 22, 1889, each for $500, I hand them to you and ask you to state by whom they are signed, if you know?

A. Signed by P. B. McCarthy, Maggie McCarthy and M. McGuire.

Q. On the first note is the word cancelled, is that your handwriting?

A. Yes, sir.

672 Q. And on the other cancelled and the words and notes, given by P. B. McCarthy, is that in your handwriting?

A. Yes, sir.

Q. Now I observe that these two last notes which the stenographer marked Exhibits 34 and 35 are payable on their face to Richard C. Lake and James Halley, I will ask you what these notes last referred to were given for?

A. Given for interest on the original loan.

Q. To the bank?

A. Yes, sir.

Q. Mr. Lake and Mr. Halley were at the time president and cashier of the bank?

A. Yes, sir.

Q. Do you know from your dealings with them that they sometimes took notes in their own names for the purpose of convenience?

A. Yes, sir. Mr. Halley said there was so many of these other notes they would take part of them to Lake and Halley.

Q. They were a part of this same indebtedness?

A. Yes, sir.

Q. If there is any explanation you desire to make about these checks, you may do so.

A. I don't care to introduce them, but it was not included in any item at all.

Q. These notes last referred to, Exhibits 9 and 10 and Exhibits 34 and 35 and 8, those have been in your possession for a long time?

A. Yes, sir, since they have been taken up at the former trial.

Q. Now, Mr. McCarthy, you have already testified that the note of January 24, 1888, for $4,000, was made by you and signed by McGuire & Tighe, was give- in renewal of the principals, four notes of $1,000 each, now tell the jury if any money passed at the time of that transaction?

A. No, sir, not a dollar.

Q. Was there any suggestion by any one to you that you were signing that note as security for McGuire & Tighe?

A. No, sir.

Q. Whose indebtedness did that note represent and evidence?

A. Mine. McGuire & Tighe signed as sureties.

673 Q. And were the notes of McGuire & Tighe for $5,333.33⅓ that you testified as secured upon their hotel property by mortgages to remain in the bank from that time until you foreclosed those mortgages?

A. Yes, sir.

Q. And when you got those McGuire & Tighe notes from the bank or from Mr. Halley for the purpose of foreclosing those mortgages, were you requested to return them to the bank after your attorney had used them?

A. No, sir, I wanted to use them at the trial, the foreclosure trials.

Defendants offer in evidence Exhibits 8, 9 and 10, being the notes of one $400, dated January 19, 1889; one for $100, dated September 17, 1888; and one for $100 dated November 17, 1888; also Exhibits 34 and 35, being the two notes, each for $500, dated May 22, 1889, referred to by the witness, also checks 12 to 25 inclusive, together with the endorsements thereon; also checks marked 26 to 33 inclusive, together with the endorsements thereon; also the memorandum Ex. 11, by which the witness refreshed his recollection on the stand.

Plaintiff objects to the offer of Ex. 11, the memorandum for the reason that the same is incompetent, irrelevant and immaterial, and is secondary evidence and is a self-serving declaration of the witness.

Objection sustained and defendants except.

P. B. McCarthy examined.

Cross-examination by Mr. Whitfield:

Q. Going back, Mr. McCarthy, just to get it understood, to the time when McGuire & Tighe came in, you then owned the property alone?

A. Yes, sir.

Q. And your note in the bank was signed individually?

A. Yes, sir. I deeded to McGuire & Tighe one-third of the property and too- back a mortgage and note. The consideration was $16,000 for the whole property, and they had one-third each. It seems to me that the notes were for $4,000 and assumed the bank's indebtedness. Their notes were $4,000 apiece and the liability of the bank, or indebtedness to the bank. The complaint you have given me verified in the foreclosure suit, was Tighe's. The McGuire

674 notes set out in the foreclosure action is for $4,000, the consideration was $5,333.33, and the other $1,333.33 against each man was one-third that I owed at the bank. These notes were made on the 24th of January, the day I cleaned up the old notes at the bank. That is the date that the joint note was given, and the mortgages were given for the full amount of their one-third. The co-partnership run for three years under the management of the

three, until January 1, 1891. We leased the hotel in the meantime, in August, to Charles Sherry and he took up Charley Seip with him, and they threw it up and I had to take it back myself. I did business as P. B. McCarthy & Co. about town here. We owned the property jointly until the partnership expired. All of these notes that I have mentioned were all interest notes on the original indebtedness, I am positive of it.

Q. At what time did Mr. Lake see you at Hot Springs and tell you that Mr. Halley was going to ruin you and that you must pay some money?

A. The date I had down was July 8, 1893, and I know it was about that time because I was there visiting my wife's folks, who lived there at that time. I did not know that Lake and Halley had a bank at Buffalo Gap until they moved it to Hot Springs. I did not get any money from the Harney Peak bank with McGuire. We borrowed one thousand dollars from the Pennington County bank to pay to the First National bank. At the time I saw Mr. Lake at Hot Springs it was, according to my notations on the paper, July 8, 1893, he showed me a letter from Mr. Halley, which I read. I remember his language pretty well there as to what he said, although it was some eight years ago.

Q. Now after Mr. Halley called you up on February 17, 1896, and after he had dared you to leave the bank unless you signed a check, you still done business with him?

A. I had to. He said he would foreclose the mortgage. He threatened it more than once.

Q. Didn't you know you had a good defense to the foreclosure?

A. Yes, it cost money to file it.

Q. You paid him this to stand off the foreclosure?

675 A. Yes, sir. I borrowed money from Tighe to help pay this, and I borrowed money of my brother-in-law to pay it.

Q. Did he demand money or interest?

A. He demanded money, to be applied on the indebtedness. He would have a little tab there and would say, "You owe this bank so much and I want you to pay some money."

Q. Was it not always interest?

A. No, sir, never, except on those items I mentioned.

Q. You wish to be understood to say that there was never interest money except when these particular checks were mentioned?

A. He would say that the interest and principal amount to so much and I want some money.

Q. And he applied it how?

A. I don't know.

Q. He didn't apply it on interest, didn't he apply it on interest?

A. Those small notes he did when it was mentioned.

Q. You said that at the former trial it was the first time you ever knew he had applied it on interest?

A. Those payments, yes, sir. I didn't know he had applied it on interest.

Q. You knew he had some $1,600 applications of usurious interest?

A. Yes, sir.

Q. Where are those payments?
A. His testimony showed.
Q. You admitted that you had paid him $1,675 of usurious interest?
A. P. B. McCarthy & Co.
Q. Didn't you state you paid it on usurious interest?
A. No, not that I remember of.
Q. You verified the original answer? That is your signature, is it not? This is the answer in the original case, before Mr. Sharp, a notary public?
A. That is not my signature.
Q. No, that is a copy. Didn't you verify the original answer? The original answer was drawn up, examine the answer and state?
A. I can't tell just now. That is in regard to the $5,000 note.
Q. Is that your signature there?
676 A. Yes.
Q. Now have you given any testimony today Mr. McCarthy of $1,675 of usurious interest of which you paid, or McCarthy & Co. paid on account of this indebtedness?
A. The amount, no, sir.
Q. Was there that much?
A. I don't know. These notes are identification of what the interest was.
Q. Referring to your memorandum to the items which you have given there and refresh your recollection from Ex. 11 and state if on the former trial you didn't testify as to those items and state that they were items paid on usurious interest?
A. What items are they?
Q. They are items of Ex. 11. $75 item, $10 item, $41.10 item, $76.15 item, $7 item, $50 paid at Hot Springs, $125 item, $25, $25, $30, and $50, were those paid on interest?
A. Not that I remember of. They were paid on the indebtedness.
Q. Did you know whether at the time these items were paid, any interest was due?
A. I don't consider those notes as usurious.
Q. When was the first time you considered those notes usurious?
A. It was brought out at the trial here. I remember it when I made the notes, but I could not help myself.
Q. Take the first four notes, you were not indebted when you gave those notes.
A. I was. It was an overdraft on the bank, as stated this morning.
Q. You had not signed any note or mortgage to the bank before that?
A. No, sir.
Q. How did Mr. Halley compel you to make a note of 18 per cent?
A. Because I was owing him.
Q. Did you resist it?
A. No.
Q. You made it freely?
A. I signed the note.
Q. Did you make any objections to that rate of interest?
A. I don't remember.

Q. When was the first time you refused to sign a note of 18 per cent?

677 A. It was during the co-partnership that it came up I guess. I can show you notes that I paid Lake and Halley three per cent a month.

Q. How early?

A. 1882.

Q. Was not that the prevailing rate?

A. I am not objecting to that.

Q. Now then, Mr. McCarthy, you turned in for collection these three or four notes of $318.50 and paid the money, what date was that?

A. December 19, 1888, I think.

Q. At said time you said you put in those notes there for collection?

A. I turned them in because they were good notes for collection, and he gave me credit for them with cash at the time. That was the understanding.

Q. You turned those notes in and got $104 cash besides?

A. Yes, to make a payment.

Q. To make a payment on this usurious interest?

A. No, sir, to make payment on the indebtedness.

Q. On that very same day you gave the bank a note of your own for the very same amount of these notes and that cash. We have a note here which you made for?

A. I put those notes in there for collection and he charged me with them.

Q. Under what circumstances would you make a note here if you put them in there for collection?

A. There was some interest, usurious interest, up to that time which might be included in that, some smaller notes and the interest on the principal would possibly amount to that much, but if it was it was in addition to this $423.

Q. When did Mrs. Franklin pay that note?

A. That was not the Mrs. Franklin note included in that batch.

Q. That was another $100 note?

A. Yes, sir.

Q. Did you have any individual transactions with the bank between the dates of the co-partnership?

A. Yes, sir, I had a private account of my own.

Q. Besides this co-partnership account?

A. Yes, sir.

Q. And this co-partnership account is a different matter?

678 A. Yes, sir. And Halley made me give my private checks for that co-partnership account.

Q. Where are they?

A. There they are right here.

Q. Now in regard to the sale of these lots, you say Mr. Halley or Mr. Lake got $800 out of it and you got credit for $600 and $200 went to your account of Mr. Fowler's?

A. $300 went to Fowler. There was a check given for that $300. I told Mr. Lake to place $600 to my credit on the notes on the

original indebtedness, and Mr. Fowler demanded $100 after making the deal and then a fee of $200, and I tried to cut him down to $200 but I could not do it, he held me up, and I had to give him a check for $300.

Q. Was the sale for $800?

A. Yes, sir.

Q. What was the date of that?

A. January 30, 1890. I got Fowler's check for it.

Q. To whom were those lots sold?

A. To Richard C. Lake.

Q. Did you make the deal direct with him?

A. Yes, sir.

Q. He paid $800?

A. He didn't pay it. I told him to place it to my credit.

Q. Did you have any other notes besides this original $4,000 note and the accumulative interest?

A. No, I had to give notes for the interest on the original indebtedness to the bank.

Q. Don't you know whether he applied the $600 on some other of your notes?

A. No, sir, my instructions were to apply that on original indebtedness as Mr. Lake said that was what he wanted to do and I told him.

Q. Now, at the former trial you didn't say anything about this?

A. I had not chance at the first trial, and I found out what had been done, and I had to go back and do this and look it up, and the judge would not let us use anything at the former trial. The judge would not let us go back that far on the other trial.

Q. What mine was this?

A. I think it was the Addie mine.

Q. What day was that?

679 A. I gave Mr. Halley the order, it is marked the First National bank. Mr. Halley was doing all the business with me except these lots and the Hot Springs matter and one other time.

Q. You don't remember the date?

A. July 3, 1889.

Q. You say you never got any of your money for that?

A. No, sir, unless it was applied on that $4,000.

Q. You gave that $4,000 note yourself?

A. Yes, sir.

Q. How long had you had that?

A. This $4,000 note you never gave up.

Q. It was surrendered to you?

A. No, sir, I never got it.

Q. How did you happen to get that one?

A. We got it taken up and a new note in the place of it.

Q. Who was interested in that mine with you?

A. I told you, McGuire and Challice.

Q. Have you been in the country ever since then?

A. I think so.

Q. Have you seen them?

A. Yes, sir.

Q. And you knew that the sale had been consummated?
A. Yes, sir.
Q. And you knew that McGuire and Challice got theirs?
A. Yes, and I thought I had got mine, a credit for mine until this came up and I didn't get the old note back.
Q. This $600 note is not endorsed on it?
A. Not that I remember of.
Q. You remember these other notes?
A. No, I don't. This was given July 3, 1889, the order was given then but I don't know exactly when the money was paid.
Q. You have said nothing about it until now?
A. This matter slipped my mind. This book is a miscellaneous book and this item with other items were in here and I didn't take this book at the other trial. This book is a regular miscellaneous book for board.

Q. You say you didn't see the note and say you didn't see
680 whether there was an endorsement on it or not?
A. No, sir.

Q. If you don't remember what the note had on it how do you know what the note was credited for?
A. It would show it.
Q. You thought so at the trial?
A. I thought it was endorsed on it at that time.
Q. You don't know whether it was endorsed or not?
A. It don't show it.
Q. Suppose you received credit for that on the books of the bank, what would you say?
A. I didn't check this out.
Q. Suppose the books of the bank show that it was checked out, would you say you got credit for it?
A. The officers could not tell anything about the books yesterday and it may be no better now.
Q. Did you get credit for $1,250 for the sale of the Addie mine?
A. I don't know whether I did or not, but I don't think I did.
Q. Did you get credit for the $250?
A. I didn't get credit for this $600.
Q. You will swear you did not get credit for this $800 for the lots?
A. No, I ought to have credit for the $600 on these lots.
Q. Will you swear that the whole $800 was not put to your credit at the bank?
A. No, I would not swear to that. I gave the order to apply on this.
Q. You don't know what they did?
A. No, I don't. I know they should have done so.
Q. You will not put your mind against the books?
A. Halley gets mixed on them himself.
Q. You said that the Clark note was paid to the bank?
A. I didn't say so. I said that the Clark note was taken up and I paid it myself.
Q. Was it an individual check or a company check?

A. I think it was a company check.
Q. Are you sure as to the date of the payment?
A. No.
Q. Have you got the Clark note now?
681 A. I think so.
Q. Whose orders were those of $16.50?
A. Two small orders for board bills.
Q. You don't remember the parties' names?
A. No, sir.
Q. When was the Franklin note paid to the bank?
A. The Franklin and wife note?
Q. Yes.
A. They paid that.
Q. How do you know they paid it?
A. They told me so and showed me the note.
Q. The Burch note, who paid that?
A. Burch I think paid it.
Q. Do you know when?
A. No.
Q. How do you know he paid it?
A. I have never seen it since nor heard of it.
Q. Now, the Jewett note, who paid that?
A. Jewett himself, Mr. Holcomb's brother-in-law.
Q. How do you know he paid that?
A. I never heard of it and if he had not Halley would have been after me for it. I endorsed it and turned it over to the bank.
Q. You have mentioned the note of January 21, 1889, for $200, what was that paid for?
A. Given in payment of interest.
Q. All of these notes were given in payment of interest just as you have stated?
A. Yes, sir.
Q. Interest on this same debt?
A. Interest on the original indebtedness.

Redirect examination:

Q. Mention has been made here on the sale here of the Addie mine on July 3, 1889, now do you not know whether you got credit in the bank or not?
A. No, I do not.
Q. What you were testifying to so far as you understand it was not credited on this indebtedness?
A. Yes, sir.
Q. You say it was intended as a payment on this indebtedness?
A. Yes, sir.
Q. That is also true of the $600 payment, the item on the sale of lots January 13, 1890?
A. To Mr. Lake?
Q. Yes?
A. Yes, sir.
682 Q. That was intended as a payment on this indebtedness?
A. Yes, sir.

Q. You do not know now whether your bank account with the bank shows whether you got a credit for that or not?

A. I do not.

Q. Or whether it was credited in the first instance and a cashier's check given for it?

A. No, sir, I know nothing about the transaction inside of the bank. All I know is the transaction that occurred between Mr. Lake and Mr. Fowler and myself.

Q. Now, Mr. McCarthy, Mr. Whitfield called your attention to the original complaint verified by you in the case of Dennis J. Tighe against yourself in this county, that complaint was prepared by myself, was it not?

A. Yes, sir.

Q. Prepared in my office?

A. Yes, sir.

Q. Myself and Judge Bangs?

A. Yes, sir.

Q. As you now recall does that give a copy of the note that you took from Tighe at the time you took the mortgage from Tighe at the time you sold him a third interest in the property?

A. I think it does.

Q. Is the complaint signed by myself and yourself and Judge Bangs?

A. Yes, sir.

Q. Would you say that that is a copy, or substantially a copy of the Tighe note?

A. Yes, to the best of my knowledge.

Q. And that is a note you took from Tighe at the time you deeded to him a third interest in the hotel property?

A. Yes, sir.

Q. And calling your attention to the complaint in McGuire case and to the signatures thereon, I will ask you if that contains as you understand it substantially a copy of the note you took from McGuire, when you deeded him a third interest in the hotel property?

A. That is to the best of my memory and knowledge.

Q. Now I will ask you to state if at the time you made a deed of a third interest to McGuire and Tighe in the real estate, you also by a bill of sale conveyed a third interest in the furniture and fixtures around there?

A. Yes, sir.

683 Q. That was done at the date of the formation of the co-partnership?

A. Yes, sir, and it was itemized, too.

Q. And it was a part of that transaction that they should deed the notes and mortgage back and sign this $4,000 note as surety with you?

A. Yes, sir, the $4,000 note at the bank.

Q. That was a part of the original transaction to McGuire and Tighe?

A. Yes.

Q. Now do you remember the circumstances under which the

original answer to the supplemental complaint was prepared? That is, that was prepared by Mr. Smith while I was in court?

A. Yes, sir.

Q. And that he copied it substantially from the case in the former suit?

A. Yes, sir, and that we talked the matter over, and he had left out the main defense.

Q. And that we prepared the supplemental answer?

A. Yes, sir.

Q. Up to what date as you now remember it did you have a private account with the First National Bank?

A. I can't state. This account was with the others.

Q. You thought you had up to 1891?

A. Yes, after that.

Q. And later you did your banking business with the Pennington County Bank?

A. Yes, sir.

Q. Do you remember when it was when the firm of P. B. McCarthy & Co. borrowed one thousand dollars of the Pennington County Bank to pay on the First National Bank's indebtedness?

The plaintiff objects to the question as being incompetent, irrelevant and immaterial and not the best evidence.

Objection sustained.

Q. Now on that mining deal, is that the Addie mine?

A. I think so.

Q. And the parties were interested with you were McGuire and Challice?

A. Yes, sir.

Q. You got more out of the mine than you turned over to the bank?

A. I was supposed to, but I don't know whether I did or not.

684 Q. The price coming to you was what?

A. $1,250.

Q. You didn't direct any of it to be applied on your indebtedness at the bank except the $600.

A. That is all.

Direct examination MICHAEL MCGUIRE:

Q. Where do you reside Mr. McGuire?

A. Rapid City.

Q. Were you a member of the firm of P. B. McCarthy & Co., composed of Patrick B. McCarthy, one of the defendants herein, yourself and Dennis J. Tighe?

A. Yes, sir.

Q. I will ask you to state, Mr. McGuire, if on or about the 21st day of January, 1888, at the request of the defendants, Patrick B. McCarthy, you went to the First National Bank of Rapid City to make same arrangements for him with reference to the indebtedness that he then owed the bank in the sum of $4,000?

A. Yes, sir.

Q. You may state what arrangements you made, if any, and who they were made with with reference to that indebtedness?

A. Mr. McCarthy and Tighe and myself agreed to go into a co-partnership business in the International hotel in the latter part of 1887, and he told me that he owed some money up at the First National Bank, and I went up to Halley and told him what we were going to do, and that there was $4,000 that we had to arrange and fix up that Mr. McCarthy owed $4,000 there, and Mr. Halley asked are you all going on the note, and I said yes, sir, and it was all agreed and accepted by Mr. Halley. That was on the last day of 1887, and the co-partnership commenced on the first day of 1888, and when the notes were fixed up I don't remember.

Q. The note bears date of January 24, 1888, according to the evidence, and it was arranged to give one four thousand dollar note, was that your understanding?

A. It was towards about the first day of January.

Q. You don't recollect the date?

A. No.

685 Q. During that conversation with Mr. Halley in reference to the giving of the new note in lieu of the $4,000 notes of McCarthy, was anything said by you or Mr. Halley in reference to your paying $4,000 in money to the bank to take up these notes?

A. No. It was spoken of that McCarthy owed $4,000 there and it was all satisfactory to Mr. Halley.

Q. At that time didn't you know of your own personal knowledge of the relations between Mr. Halley and McCarthy were somewhat strained and that was the reason Mr. McCarthy sent you?

A. I never knew of any feelings at the time, but I paid no attention to it.

Q. You signed this note with Tighe and McCarthy?

A. Yes, sir.

Q. Signed it as surety for McCarthy?

A. We all three signed the notes.

Q. Did Mr. Halley require of Mr. McCarthy additional security in addition to McCarthy's signature, yourself and Mr. Tighe in the form of promissory notes, given by yourself and Tighe to McCarthy, put up collateral security?

A. If I remember right the notes that were given were given to McCarthy for our respective interest. I don't know whether McCarthy left them in the bank or not, but I think he did. They were deposited there.

Cross-examination by Mr. WHITFIELD:

I heard McCarthy's testimony here this afternoon and he testified that I bought a third interest in the hotel and that Tighe bought a third interest in the hotel and bar for one-third of $16,000 each, and that made each give $4,000, and assumed one half of this indebtedness at the time, but I am not clear on that. I know we signed a $4,000 note at the bank, and gave McCarthy a note for

$5,333 as our pro rata of the property. I see by the complaint which you hand me where McCarthy attempted to foreclose the mortgage given by me, the note is alleged to be $4,000, but I am not clear as to the testimony of McCarthy that we assumed $1,333 of the indebtedness to the bank. As to that I cannot recollect. I know we signed a note of $4,000. I heard a part of Mr. Halley's testimony yesterday or the day before, to which he said I came to the bank and made a transaction with him. That was in the
686 last days of December and I introduced the subject to Mr. Halley and told him what I was after and told him what we agreed to do, and Halley said it was all right. If we three signed the note it would be all right. I received a bill of sale for my third interest. It was run as a co-partnership and I never got my interest back until it was sold by the sheriff. I don't remember making any payments on the $4,000 note we signed. McCarthy and Tighe generally done all the business. I had considerable property at that time and I had a contract for changing Rapid creek and was busy that way. I remember making a payment in December, 1890, at the bank. It was about the time we had the Indian trouble here. I think I gave McCarthy about that time to make some payments at the bank, if my memory is correct. I remember the sale of the Addie mine. I do not know about McCarthy getting $1,250, but I know it was placed to his credit. McCarthy and I got $2,500, one-half each. I gave Halley a check for his portion of it and told Halley to put it to his credit. Wilson was leaving the country and I went there and held him up and he didn't want to pay it and he finally said he would get a three or ten days' draft on New York, and we agreed on that, and we had to give it to Halley and Halley collected it and paid it on the note. I told him that half of it belonged to me and half of it belonged to McCarthy. We fixed up with Wilson right there in the bank. I don't remember who was present. It was in the back room. Wilson and I had some trouble. The note was drawing two per cent interest. He told me if he had me over in England he would have me arrested for the two per cent. The note run to me, Mr. McGuire.

Redirect examination:

Q. Mr. Whitfield asked you about your conversation with Mr. Halley with reference to this $4,000 note signed by yourself, McCarthy and Tighe, did you at that time ask Mr. Halley for a loan of $4,000 and tell him that McCarthy and Tighe would sign the note as sureties if he would let you have it?

A. I went in and stated the object of our business and I
687 illustrated to Mr. Halley *that was* were going to do and Mr. Halley said it was all right.

Q. What was all right?

A. For the three of us to go on the note?

Q. And nothing was said about McCarthy and Tighe signing as sureties for you?

A. Not that I remember of.

Q. Nothing about getting money out of the bank and paying it over to McCarthy?

A. I don't remember anything of that kind.
Q. Then the arrangement that you made with Mr. Halley was the renewal of McCarthy's indebtedness by yourself and Tighe joining in the indebtedness with him?
A. Yes, sir.

Recross-examination by Mr. WHITFIELD:

Q. Your note, McCarthy's and Tighe's, paid McCarthy's debt there?
A. It renewed McCarthy's old note and made a new instrument.
Q. And McCarthy got his old note?
A. I suppose so.
Q. And they held you on the other note?
A. Yes, I was on the other note for some time.

Redirect examination by Mr. SMITH:

Q. There was no money changed hands at that time in any way?
A. No, sir.

Recross-examination by Mr. WHITFIELD:

Q. There was some interest paid?
A. Everything was straightened up for $4,000.
Q. Any difference of interest or anything else was settled up.
A. Yes.

Redirect examination by Mr. SMITH:

Q. The bank records introduced in evidence yesterday show that a note of $219 was given on the same date that you, Tighe and McCarthy signed the first note, did they borrow any money at the time?
A. I don't remember anything about the 24th of January, 1888.
Q. The date that you signed the first note with McCarthy at the First National bank, the bank records show that on that same date a note was given by yourself, Tighe and McCarthy for $219, state if that was not represented by the accrued interest on the indebtedness?

A. Not that o remember of. I know we talked the matter
688 over and agreed on $4,000 and that was in the latter part of December, 1887.

Q. You know that on the dates the notes were given there was no money changed hands?
A. No money paid to us.
Q. Or to Tighe?
A. No.
Q. Or to McCarthy?
A. No, sir.

PATRICK B. MCCARTHY recalled by the defendants.

Redirect examination by Mr. BROWN:

Q. Mr. McCarthy you heard Mr. Halley's testimony when on the stand?

A. Yes, sir.

Q. When McGuire, you and Tighe signed the notes of January 24, 1888, or at any other time, was there anything ever said by any of the parties in your presence or hearing about you being surety for McGuire and Tighe?

A. No, sir, never heard of it until Halley swore to it here.

Q. Mr. Whitfield spoke of some testimony that he says you gave to the effect that it was a part of the arrangement between McGuire and Tighe and yourself that they should each assume one-third of your indebtedness at the bank, is that the understanding?

A. My understanding was that they went on the notes as sureties for me. The note was mine and that was what I swore to.

Q. What was in fact the arrangement, if you had any, between you, McGuire and Tighe with reference to your connection with your paper at the bank?

A. They were to go on as sureties with me on that note, so as to strengthen the notes and pay it off, and each one of them agreed to take a place in the hotel and give their attention to the business.

Q. The real estate note you took was shown you a moment ago from Tighe and McGuire, that was simply for $4,000?

A. Yes, sir.

Q. And in addition to that you conveyed them an interest in the bar fixtures and furniture in the hotel?

A. Yes, sir.

Recross-examination by Mr. WHITFIELD:

Q. That was all a part of the real estate deal, the bar fixtures and furniture in the hotel?

A. Yes, sir.

Q. And consideration was $5,333.33?

A. Yes, sir.

689 Q. You will not change your testimony in which you stated that the other $1,333 represented their half on the bank note?

A. They didn't consider that. They went on as sureties for me. And I was the original debtor to the bank.

Q. How did they pay the other?

A. They were to put in their labor.

Q. They didn't do that?

A. Tighe gave some money to the firm and McGuire also gave some money to me.

Q. And you were all liable on that note?

A. They were on there as sureties.

Q. McGuire went to the bank to see about it?

A. I told him to. Halley was rounding me up and was crowding me for this money.

Q. Which money?
A. $4,000.
Q. Three of these notes are not due?
A. One was due and another about due.
Q. So you got the other fellows on to strengthen your paper?
A. Yes, sir.

Redirect examination by Mr. BROWN:

Q. Now I want to ask you this question, aside from Mr. McGuire and Mr. Tighe going on your paper as sureties with you at the bank and aside from the money which Mr. Tighe put into the new business $150 or more, and aside from their giving their time and attention to the business, is not this a fact that they agreed that the co-partnership capital should be something like $15,000 or $16,000 and that each should contribute to it one-third and that you deeded to each that way?

By Mr. WHITFIELD:

Q. Is that in writing?
A. Yes, sir.

The plaintiff objects to the question as not the best evidence. Objection sustained.

By Mr. BROWN:

Q. Did you search for that writing?
A. Yes, sir.
Q. Did your counsellor request you to find that contract?
A. Yes, sir.
Q. Did you search for it?
A. Yes, sir.
Q. Did you search for it where it ought to be?
A. Yes, sir.
690 Q. And in the place where it ought to be?
A. Yes, sir, and I searched for it among the Tighe papers. And I sent Mr. Galigher up stairs to search for it in a bundle of papers and it was not there.
Q. Didn't you have an iron box in which you kept these Tighe papers?
A. Yes, sir, and that is where it should have been.
Q. Then you searched in all the places where you expected to find that paper?
A. Yes, sir, I could not find it, and I searched again for it today and could not find it.

Plaintiff objects as not the best evidence. Objection sustained. Plaintiff excepts.

The answering defendants now produce and offer in evidence the following papers in a case pending in this court wherein the First National Bank of Rapid City, a corporation, is plaintiff, and the answering defendants Patrick B. McCarthy and Maggie McCarthy are defendants, to-wit: Summons signed by William Gardner and Wood & Buell, plaintiff's attorneys, dated June 30, 1898, complaint

in same case verified by Herbert W. Somers, cashier, under date of June 5, 1898, together with sheriff's return of service thereon upon the answering defendants upon July 7, 1898, also answer the defendants, Patrick B. McCarthy and Maggie McCarthy in that case, notice of trial served by plaintiff's attorney upon defendants' attorney, the plaintiff waives the identification of the papers by the clerk. Defendants also offer in evidence all the endorsements and filings made on the papers last mentioned. Copies of said files and papers are hereto annexed as a part of this bill. Further offer in evidence treasurer's tax deed No. 135, dated June 11, 1898, purporting to convey the mortgaged premises in this action to the plantiff to the First National Bank of Rapid City together with the endorsements to recording and other endorsements thereon, marked Ex. 36.

Answering defendants also offer in evidence all of that portion of the eighth paragraph of the plaintiff's supplemental com-
691 plaint herein verified by Herbert W. Somers on the 1st day of October, 1900, down to and including the word "deed" in the sixth line of the said eighth paragraph, which said paragraph — in words and figures as follows: "And plaintiff further alleges that no action or proceeding has been had at law or otherwise to recover the sum so secured by said notes and mortgages or any part thereof except that a tax deed was issued to plaintiff for the taxes against said mortgaged premises for the year 1894, and an action was commenced for the possession of said premises under said tax deed."

JOHN P. MCELROY, JR.

Direct examination by Mr. BROWN:

Q. Mr. McElroy I hand you what purports to be the files in the ejectment case of the First National Bank of Rapid City against Patrick B. McCarthy and Maggie McCarthy, and ask you if those are the complete files as filed in your office?

A. Those are all the papers filed in the office.

Q. Has there ever been filed in your office any notice of motion served upon defendant's counsel in that case of an application for an order of dismissal?

A. No, sir, none filed.

JAMES KEENAN.

Direct examination by Mr. BROWN:

My name is James Keenan. I reside at Rapid City, South Dakota. I have resided here over twenty years. I am acquainted with Patrick B. McCarthy and Mr. Halley. Also James W. Fowler, attorney for the bank. There was a time when I occupied the rooms in the rear end of the International hotel on Sixth street in this city, for the purpose of running a sample room, rented it from McCarthy. About July 1st, 1893, Mr. McCarthy gave an order to me to pay the rent coming to him to pay it to the bank. An order was given for $250. No other given in July, about the 24th of July. Then there was an order given for me to pay all the rent to the bank. I have not got

the order. Mr. Somers had it the last I saw of it. It was not delivered to me. There was one order in July and one in September. These orders were brought by Mr. Somers. The last order was to pay a certain amount of money, something like $200, and I objected to paying at that time. It was to be paid to the bank and was
692 signed by McCarthy. In July I was paying $75 per month rent. Later on I made the payments to the bank. I paid about six months at the rate of $60 per month and for about the same period of time I paid about $40 per month, later it was cut down to $25 per month, and paid for about fifteen months at the rate of $25 per month. Begun about the first day of July to pay about $60 per month, which I paid for six months, then I paid six months at $40 per month, then the balance for fifteen months at the rate of $25 per month, making about twenty-seven months in all up to about September 27, 1895. I objected to paying the amount of sixty dollars per month, the reason that business was not quite so good and we were not making so much money. I made the arrangements with Mr. Fowler for the reduction of the rent. He was acting for the bank and for me a little. Dispute came up between McCarthy and I. The rent was also reduced from $40 to $25 per month through the advice of Mr. Fowler. I told him that I could not pay $40 a month any more and he says I will see it is reduced. How much could you pay? and I told him $25 per month and he says all right I'll see that you pay that. Mr. Somers took the $25 per month and made no kick. I told Mr. Somers I could not pay any more. Never had a talk with McCarthy about reducing the rent.

Cross-examination by Mr. WHITFIELD:

Mr. McCarthy begun an action against me for rent. It was about the time it was reduced to $60 per month. He served notice on me to leave the building and there was a difference in the amount between him and I and I told him that if he would allow that I would pay the money that was coming, and he brought the action against me. I beat him. It was agreed someway between McCarthy and Halley. It was six months I think I paid at $60 a month and the amount of my bill was $265.55 was deducted. Somers collected about six months at sixty dollars a month, about six months at $40 per month and about fifteen months at $25 a month. Mr. Fowler was my attorney at that time. I spoke to him about getting it reduced. I don't know how he accomplished it. He thought that that was sufficient rent and that I ought to get the building for that.

693 Redirect examination by Mr. BROWN:

This bill of $261.55 was a bill I had against Tighe. No, I think not, it was a bill against McCarthy, the time McCarthy opened up and took the hotel back. I did not pay Mr. Fowler any money to get the rent reduced. This $265.55 was not taken out before I commenced these payments. It run along from the 1st of July down to three or four months. I think it was four months. I have the book account of it yet. I did not say at the former trial that the bill was against Tighe. I never had a bill against Tighe.

Redirect examination by Mr. BROWN:

P. B. McCARTHY recalled.

Q. Mr. McCarthy, as I remember the evidence the last principal note, or renewal note that Mr. Tighe signed was August 7, 1888, will you tell why you didn't sign any of the later notes, if you know?

A. He said he didn't want to be putting in any more of his time, in trying to pay off this indebtedness.

Q. So far as you now remember this note, Ex. 1 for $4,000, dated August 7, 1888, was the last principal note that Tighe signed, was it not?

A. Yes, sir.

Q. And he refused to renew the paper further after that?

A. Yes, sir.

Q. Now the plaintiff, or Mr. Halley or Mr. Somers testified from their books that the note of $5,000 of date May 22, 1889, that was signed by yourself, Mrs. McCarthy and M. McGuire, did McGuire sign any principal note or renewal note after that time?

A. No, sir, he did not.

Q. That was the last note he signed?

A. Yes, sir.

Q. Then the next principal note or substituted note was the note for $5,000 of July 22, 1891?

A. Yes, sir.

Q. When the note of July 22, 1891, was given, where was Tighe, if you know?

A. I don't know, he was not in the country. I think he was in Wyoming?

Q. Was Mr. McGuire in town?

A. Yes, sir.

Q. And that is the note sued on?

A. Yes, sir.

Q. Why didn't Mr. McGuire sign that paper?

694 A. He dropped out and didn't want to pay money any longer and bear the burden.

Q. He refused to continue any longer after the note of July 22, 1889?

A. Yes, sir.

Q. In 1889 or 1890 Mr. Tighe failed in business did he not?

A. Yes, Tompkins and Tighe.

Q. Was there a time after Mr. McGuire signed the note of May 22, 1889, that he removed from this county and state?

A. Yes, he moved to Omaha.

Q. When was that, if you recollect?

A. I don't remember what time it was.

Q. Do you remember whether Mr. McGuire was here when the mortgage note was given of July 22, 1891?

A. I don't remember whether he was here or not.

Q. You stated Saturday on your examination that the co-partnership contract between yourself, McGuire and Tighe was in writing, is that right?

A. Yes, sir.
Q. Where is that contract, the original?
A. I don't know.
Q. You had it a few years ago?
A. Yes, at the time of the trial of the foreclosure.
Q. Now at the time of your foreclosure against Tighe, where an issue was raised as to that contract you had that contract?
A. Yes, sir.
Q. And about that time there was a copy of that contract prepared that you verified and knew to be correct?
A. Yes, sir.
Q. Do you know that the copy of the notes one note of Tighe for $4,000 of date January 4, 1888, and a note of Tighe of same date as set out in the pleadings Mr. Whitfield referred to, you knew these notes set out were correct copies of the original notes?
A. Yes, sir.
Q. I hand you a copy of what purports to be a copy of that contract marked exhibit 37 and ask you if that is the copy that you swore to during some of the litigation and if you believe it to be a correct copy?
A. Yes, sir.
695 Q. Referring to exhibit 38 the complaint in your foreclosure case against McGuire, that was verified by you on the 28th day of August, 1894?
A. Yes, sir.
Q. I will ask you if that is a true copy of that McGuire note that you took when you sold him a third interest in your property?
A. Yes, sir.
Q. And referring now to Ex. 39, the complaint of your foreclosure suit against Tighe, verified August 18, 1894, I will ask you if that complaint sets out a true copy of the note which you took from Tighe at the time you sold him a third interest in the hotel property, the mortgaged premises?
A. Yes, sir.

Defendants offer in evidence with objection exhibits 38, 37, and 39.

Q. I hand you here Ex. 40, as marked by the stenographer for identification, being a bill of sale from P. B. McCarthy to M. McGuire and will ask you if that was signed by you and witnessed by Patrick O'Connor, the Irish barrister?
A. Yes, sir.
Q. Is that the bill of sale furnished in connection with the McGuire note just read in evidence?
A. Yes, sir.
Q. Have you looked for the bill of sale in the Tighe matter?
A. Yes, sir.
Q. Have you searched for it?
A. Yes, sir. I searched for it last evening.
Q. State if a similar bill of sale was made by you at the same time to Mr. Tighe as recited in the Tighe note?
A. Yes, sir.

Received without objection in evidence, being exhibit 40.

Q. Now I notice, Mr. McCarthy, that the deed that is referred to in that note of Mr. Tighe is on its face the express consideration $5,333 and some cents, and that this bill of sale and that the McGuire deed has the same consideration, and that the bill of sale is for an express consideration of $1.00 and other valuable consideration, now I will ask you if a consideration was recited in the deed is the true consideration? State what the true consideration of the true bill of sale and deed to Mr. McGuire and Tighe each were?

A. $5,333.33⅓.

Q. The consideration for what?

A. For the property and furniture.

696 Q. For the entire real property?

A. Yes, sir.

Q. Now the real estate was sold at the valuation of $12,000?

A. Yes, sir.

Q. And the personal property described in that inventory and referred to in the bill of sale was put at the consideration each of one-third of $4,000?

A. Yes, sir.

Q. Now, you, McGuire and Tighe at the formation of that copartnership each contributed an exact amount to that copartnership?

A. Yes, sir.

Q. And that was in what?

A. The hotel property real and personal property.

Q. Was that when P. B. McCarthy & Co. commenced business, the entire assets, the mortgaged property and the real estate referred to in the bill of sale?

A. Yes, sir.

Q. And on Saturday you testified that it was understood between McGuire, Tighe and yourself that at the time of the formation of the copartnership that they would sign the papers up at the bank as sureties with you?

A. Yes, sir.

Q. I notice, Mr. McCarthy, in the checks offered in evidence here some of your checks are apparently the money of P. B. McCarthy & Co., that was paid on your note of yours, now tell the jury what was done between the partnership of McCarthy & Co. when the firm of P. B. McCarthy & Co. made a payment upon your notes at the bank?

A. The payments were generally always made by me, and I was to give Mr. McGuire and Tighe credit for his amount on my notes or on the notes of the personal and real estate which I deeded them.

Q. If the firm of P. B. McCarthy & Co. made a payment on your note of $150 at the bank the understanding between you, McGuire and Tighe was that they were to have credit and did have credit on the money due them on the sale of the hotel property and furniture?

Plaintiff objects as incompetent, irrelevant and immaterial and not binding upon the plaintiff bank. Objection sustained. Defendant excepts.

697 Q. Under the arrangement between you on the one side and McGuire and Tighe on the other, if $150 was paid by the copartnership of P. B. McCarthy & Co. upon your note at the bank, state to the jury what credit if any McGuire and Tighe were entitled to upon that account upon the monies they owed you on the sale of the hotel furniture.

A. They were entitled to each one-third of the amount on the notes.

Q. Did they give you anything to evidence your sale on the furniture and fixtures?

A. Yes, sir.

Q. What did they give you?

A. Each a note for $1,333.33⅓.

Q. A piece?

A. Yes, sir.

Q. Where is that?

A. I don't know unless it was with the other papers, and can't be found.

Q. You searched for them?

A. Yes, sir, many times.

Q. There was no security for that indebtedness on the sale of the furniture and fixtures?

A. No, it was this way. The real estate was considered worth $12,000 and the furniture was considered worth $5,000 and as the furniture was subject to wear and tear and would have to be renewed at times, it was agreed that we should not mortgage it, and as Mr. McGuire once said, it would look bad to have a mortgage on the furniture, and for that reason they gave their notes each for one thousand three hundred and thirty-three dollars and thirty three cents for their interest in the furniture.

Q. McGuire and Tighe each got credit for their monies paid on your note at the bank?

A. Yes, sir.

Q. Now you heard Mr. Halley in his listing various notes since the original notes?

A. Yes.

Q. Were any of these notes given and received in payment of the original indebtedness?

Q. Which ones?

Q. Any of these notes, were they given in payment or renewal of the old notes?

A. These later notes were given in renewal of the later or older notes.

Q. That is true of all of them?

A. Yes, sir.

698 Q. Perhaps you do not still get the full idea. At the time you made renewals with Mr. Halley was it ever expressly agreed that these notes were to be renewals of the other notes?

A. It was agreed that they were to take up the other notes.

Recross-examination by Mr. WHITFIELD:

Prior to the organization of the co-partnership that I have spoken of today I did not keep a regular set of books. I had no clerk and had to do most of the things myself. After the co-partnership was formed I don't know how the books were kept. Mr. Tighe kept the books at first until he dropped out or was absent on a visit, but he was not regular and was no bookkeeper. We made no list of the notes as they were made, just held them and kept a day book to signify what they were. My best record would be memorandums or memory or there may be a slip of paper put in the safe to show what they were. There was a day book kept for board bills, and I have nothing to refresh my recollections at this time except the slips which were put in. I do not know at this time where the slips are. I presume they are with a lot of miscellaneous papers. I have not seen them lately. I went through with them and got what information I could. This partnership was dissolved by the others dropping out. Mr. Tighe dropped out first. There was no money in it. Mr. Tighe had the privilege over and above McGuire. Mr. Tighe thought of removing to Wyoming unless the business would pay. You see the business was dropping down as it was after the boom. Tighe was not in poor health, he dropped out first. Never published any notice of dissolution. When Tighe got tired and had enough he just dropped out and quit. McGuire went the same way, and I foreclosed their interest in the property and got the property back. At the time I was in Hot Springs Mr. Lake showed me a letter which Mr. Halley had written him. I fix the date about July 8th or about that time. I had it down in my note book. I do not know what Mr. Lake came down there for. He happened to see me after I was there. I only remember the purport of the letter. It was one Halley had written to Lake and was to pay more money. The letter was not written to me. Mr. Lake says to me here is a letter I received from Mr.
699 Halley asking more money of you. The Seip rent was later. I had given an order to Mr. Halley before I went down to collect rent of Mr. Hill. Keenan and Seip orders were given before. Seip dropped and afterwards Tracey and Seip went in together. These orders were not to apply on interest. Mr. Halley did not write me at Hot Springs to remit rent that I had collected. My recollection is pretty good on that, and is as good as on any of these matters. I am sure that I gave him that $50. I am sure that the letter was given to Mr. Lake and was for me to pay him some money. This $203 payment check I presume I gave to Mr. Halley. Am not positive, but I think it was to Mr. Halley. The conversations were generally with Mr. Halley, as I don't remember any conversations with Mr. Lake except this $50 payment and the sale of the lots and another matter. He did not send Somers down after it. Mr. Somers only came down for money for outside business. I do not remember that I ever gave any checks to apply on this indebtedness. I cannot tell out of all there checks that one of them was given to Mr. Somers. This check of August the 6th for $76.13 in reference to the circumstances under which it was given and who I handed it to being ex-

hibit 16. I think the note of Jewett was paid with that check and the note was made out in July I think and paid in with that check. The note was put in for collection and the check for payment and it seems to me that I ought to have credit. I have not got the note mentioned in with my credits. But the check was put in as a payment on the indebtedness and the note made $90. The note was given in July I think. I do not remember who was present. I think it was in the bank. I don't remember that Mr. Halley was present. I would not swear that he was not. And would not swear that I had a conversation with him on that day, but most of my conversations were with Mr. Halley. I do not know under what circumstances a check of $217.10 of August 11, signed by P. B. McCarthy & Co. was given only that it was paid on the indebtedness. I do not remember who received it at the bank. I generally took the checks up. Don't remember about seeing Mr. Halley at that time. Don't re-
700 member it. Do not remember the particular conversation or with whom I had the dealing in regard to exhibit 24, check for $200.33, date March 22, 1890. As a general rule I had the conversations with Mr. Halley. I do not remember the particular circumstances in reference to the delivery of Ex. 23, check of $250 of date November 27, 1889, by P. B. McCarthy & Co. by myself. All of these checks as I selected them were payments on the indebtedness except some there as stated as interest. These checks made payable to the order of interest were made to apply on them. One of these blue checks there was made payable to the order of interest. It was paid as interest. I gave it to the bank there as I have stated. Almost all of my transactions were with Mr. Halley. That was paid on interest as he was jogging me up, and I paid it as interest. Mr. Tighe, as a rule, did not deliver checks at the bank. He may have delivered one or two. I don't remember about Ex. 27, whether I delivered it or not. When Tighe made out interest checks he signified them as interest checks. I think he made out two interest checks there as interest checks. I do not know what the mine was sold for. Mr. McGuire made all the transactions wherein we were to get $2,500. I think the sale of the property was for $5,000. Mr. McGuire did the business. Challice traded one thousand dollars of his interest for stock in the Box Elder Land & Live Stock Company. We put up the money to develop it. I paid for my share of the mine, one-third interest in the McGuire and Challice mine. I did not check out of the bank my portion of the mine money. McGuire told me that there was $1,250 there for my interest. I don't think half of that was placed to my credit. I gave an order for half of it and the order has not been placed to my credit. Mr. Halley would not show me the books or give me any information when I would ask him. He would always say you are indebted to this bank so much, and I want you to pay so much. I had an open account and a pass book at that time. I don't remember of its being in my pass book. I never remembered it until recently and then I could not find the books. That was in 1889, about July 3rd the order was made. I have not made a good

many notes on this indebtedness since that time. I have been
701 doing some business since that. They have stopped my credit not because they wanted to apply on this interest. I had to do business with the other bank and borrowed some money to pay on this indebtedness, and Mr. Halley did not like that. McGuire and Tighe signed the $4,000 note as sureties to take up my four one thousand dollar notes. On Saturday I stated they signed the notes for $4,000 and gave their $1,333 notes each for furniture and fixtures. A surety is an endorser on a note. The profits of the company up to the time Tighe dropped out had not equalled $1,333.33, his portion that the furniture and fixtures came to. At the time that McGuire dropped out, his portion had equalled it and was all paid into the bank. As fast as McCarthy & Co. made payments on this indebtedness McGuire and Tighe were credited on their furniture notes. I have not got these notes. Never delivered thm to McGuire or Tighe. I endorsed these payments on the book at the time. The book was mislaid. Outside of the slips and books as I stated before this transaction had all been done away with and the papers and books had been mislaid, and there is one bunch of checks that are gone. The stub books are gone. I can't find them, and some of the McCarthy & Co. matters I can't find. Halley has got that note. He never gave that up, being a $4,000 note. I am positive of that. I have those main notes. No mention was made in the foreclosure suit against McGuire or Tighe of a payment of a third of these credits. P. B. McCarthy & Co. stopped payment at the bank before the foreclosure proceedings. Quite a while before. The agreement to credit these payments on these notes was oral. The furniture notes were the same date as the other notes. There was no surety on these notes. The reason they did not mortgage the furniture and fixtures was that the credit of the company could be hurt by it, and was subject to wear and tear. The real estate was the only thing mortgaged. I got the furniture back the same as I got the other back. There was no mortgage on it. I got it back by paying for it. They just simply left and went away.

Redirect examination by Mr. BROWN:

The firm of P. B. McCarthy & Co. made no profit out of
702 the business. That appeared in the former trial where we had Mr. Black as an accountant. When we made this deal with McGuire and Tighe it was expected that there would be profits out of the business so that the furniture and fixture matter would be settled up, but instead of that business kept getting worse, and further prohibition set in and we quit selling liquor and the hotel business is not good except with a bar in connection. The falling off of the business made the thing run a little different from what we expected when we made the deal with these parties. When Mr. Tighe dropped out he just simply left and I retained the possession of the furniture and fixtures because it was not paid for. I foreclosed the real estate mortgage and the same was done with Mr. McGuire when he dropped out. That mining deal with Wilson was

attended to by Mr. McGuire entirely. I knew at the time that some money was coming to me and that I should have credit for it on this indebtedness. One half of what McGuire got. And I gave the order to Mr. Halley to apply $600 on this indebtedness.

Recross-examination by Mr. WHITFIELD:

When I saw Mr. Lake at Hot Springs I had been down there sometime. I went down to spend the time with my wife's people, as they were living there at the time.

The defendants at this time offered in evidence pages 74, 75, 76, 77, 78, 79, 104, 105 and 106, of the record in this case, the record made upon appeal in the supreme court of the bill of exceptions; the instruments offered are the special execution, notice of sale, sheriff's return of sale and the notice of motion for a new trial in this action, by which it appears that said mortgaged premises were sold on June 19, 1897, under and by virtue of the execution issued upon the judgment rendered on May 4, 1897, in favor of the plaintiff, in the sum of $6,460.69, and was bid in by the plaintiff for the full amount of said judgment and all accruing costs of sale, which said report of sale was filed in the office of the clerk of the circuit court of Pennington county, South Dakota, on June 19, 1897, the day of the sale, and was duly confirmed by the order of said court, dated July 7, 1897.

703 W. H. LA BEE testified as follows for the defendants:

Direct examination by Mr. BROWN:

My name is W. H. La Bee, reside at Rapid City, South Dakota. Up to last year I was county treasurer for four years, now deputy under Mr. Tittle. A tax certificate 12,964, offered in evidence in this case purporting to be a certificate of sale to Pennington county for delinquent taxes on the International hotel property for the year 1896 and signed by myself as treasurer. That transaction was had with Judge Gardner for the bank. The assignment was made to the First National Bank. Judge Gardner paid the money for the bank on the assignment of that certificate and the prior taxes referred to there. I am now and was at that time acquainted with the practice and customs of the treasurer's office with reference to penalty and rebate on taxes. The amount of money required to satisfy these taxes, if instead of taking an assignment of a certificate from the county, the defendant bank, or Judge Gardner for the bank, would have been $56.17. If the bank had paid the taxes as mortgagee and taken the receipts as mortgagee it would have cost $56.17 less than it would have to take an assignment of the county's certificate, and pay the other as prior and subsequent taxes. Judge Gardner before he took the assignment of that tax sale certificate was in there two or three times looking the matter up. I don't know how much time he spent in there, but like a great many others he took tax sale certificates. He looked them up. He was looking up the record as to this tax sale certificate and title. At that time and prior thereto the bank and Mr. Somers had paid a large amount of taxes due the

treasurer's office. They had taken advantage of the resolution of the commissioners deducting the penalty and interest in some cases, not for themselves always but for their clients. I have here the notice that was given for the application for this tax deed. This paper, Ex. 41, is the notice that the bank gave of this application for the tax deed on the mortgaged premises and the affidavit of the printer of publication thereof. That was filed in the treasurer's office April 11, 1898.

Ex. 41 received in evidence.

704 A. There was no other proof of notice filed in my office.

HORACE CROCKETT testified on behalf of defendants.

Examined by EDMUND SMITH:

I am the deputy county auditor. Was county auditor prior to March 1st. Have the care and custody of the meetings and records of this county. At the meeting of July 4, 1896, following resolution was passed by the commissioners and is found on page 568, as follows: "Whereas, a large portion of the taxes due Pennington county, South Dakota, remain delinquent and unpaid upon town lots and other real estate, also upon a large amount of personal property, and whereas the collection of said taxes is rendered extremely difficult by reason of the depreciation of all property values within said county, and the great financial distress which now prevails among the people of said county; therefore, be it resolved, by the board of county commissioners that in all cases of delinquent taxes the county treasurer of said Pennington county is hereby empowered, authorized and instructed to issue to the owner or owners of such property upon the payment to him of a sum of money equal in amount to the original tax assessed against such property (not including penalty and interest) for the years they are delinquent, and it is hereby expressly understood that no compromise or reduction shall be made unless the whole amount of delinquent tax due and delinquent as aforesaid, for one full year, shall be paid, and that such payment of taxes is made by the owner or owners of such property to the said county treasurer on or before twelve o'clock noon on the first day of December, 1896, this resolution is adopted subject to the approval of the judge of the circuit court in and for the Seventh judicial circuit in and for the State of South Dakota. Adopted July 24, 1896."

This resolution was amended on October 6, 1896, in commissioners' record "C," page 576, being the same record I read from a moment ago. The amended resolution is as follows:

"It was moved and carried that the tax resolution passed by the board of county commissioners July 24, 1896, be amended *and* read as follows: Whereas, a large portion of the taxes due Pennington

705 county, South Dakota, remain delinquent and unpaid upon town lots and other real estate, and also upon a large amount of personal property, and whereas the collection of such taxes is rendered extremely difficult by the depreciation in all property

values within said county and the great financial distress which now prevails among the people of said county, therefore, be it resolved, by the board of county commissioners that in all cases of delinquent taxes the county treasurer of said Pennington county is hereby empowered, authorized and instructed to issue to the owner or owners of any such property their receipt in full upon their payment to him of a sum of money equal in amount to the amount of the original amount assessed against such property not including penalty or interest for the years there delinquent, provided, and it is hereby expressly understood that no compromise or reduction shall be made unless the whole amount of the original taxes due and delinquent as aforesaid for one full year shall be paid, and that such payments of taxes made by the owner or owners of such county to the county treasurer on or before 12 o'clock noon of the first day of December, A. D. 1896, this resolution is adopted subject to the approval of the judge of the circuit court in and for the Seventh judicial district of the State of South Dakota."

This resolution I have just read was amended November 27, 1896, on page 616 of the same record, and is as follows:

"It is moved and carried that the resolution passed by this board of county commissioners on the 24th day of July, 1896, by which penalty and interest were abated upon certain delinquent taxes due to Pennington county, which said resolution is amended by said act of the board of county commissioners, taken on the 5th day of October, A. D. 1896, shall be and is hereby further amended by striking therefrom the last clause by which said resolution remains subject to the approval of the judge of the circuit court in and for the Seventh judicial circuit of the State of South Dakota. Moved and carried that the time during which said resolutions shall remain in effect shall be and is hereby extended from December 1st, 1896, until
706 January 15, 1897."

The next reference to it is on page 631 of the same record of date January 16, 1897, and is as follows:

"Upon motion the resolution of the board of county commissioners abating penalty and interest on delinquent taxes under chapter 118, session laws of 1889 that expired January 15, 1897, at 12 o'clock m., was re-enacted and time extended to April 15, 1897."

On April 16, 1897, page 11 commissioners' record I find the following:

"By motion time for abatement on penalty and interest on delinquent taxes on real estate was extended to April 24, 1897."

April 26, 1897, page 17 of the same record is the following:

"By motion time for abatement of penalty and interest on delinquent tax on real estate was extended to July 15, 1897."

On July 17, 1897, page 41 Commissioners' record "D" the following:

"By motion time for abatement of penalty and interest on delinquent tax on real estate by resolution of July 24, 1896, and amended October 15, 1896, was extended to October 15, 1897."

On page 72 same record is the following:

"Which was adopted." "Resolved that the time for the abatement

of penalty and interest on delinquent tax on real estate established by resolution of the board of county commissioners on July 24, 1896, and amended October 15, 1896, and the same is hereby extended to 12 o'clock noon, 15th day of January, 1898, and be it further resolved that nothing in said resolution shall be held or considered to apply to the taxes of 1896." Adopted October 15, 1897.

And on page 109 of date January 21, 1898, same record:

"By motion time limit for the abatement of penalty and interest on delinquent real estate tax prior to April, 1896, was extended to April 15, 1898."

JAMES HALLEY recalled by the defendants for further cross-examination by Mr. Brown.

Q. Mr. Halley I will ask you — at the former trial of this
707 action in April, 1897, I think it was, you did not give the following testimony: "I am now and for more than ten years last past have been the cashier of the plaintiff bank. This note which you hand me, dated May 22, 1889, for the sum of $5,000 with interest at 12 per cent per annum from June 22, 1889, and marked Ex. "E" is the note of the defendants Patrick B. McCarthy and Maggie McCarthy and one Michael McGuire. My recollection is that it was signed in my presence by each of them. No payments have been made thereon except as shown by the endorsements on the back of the note. Ex. "E" with endorsements thereon is offered in evidence by the plaintiff and admitted without objection. Ex. "E" reads as follows: Rapid City, Dak., May 22, 1889. Twelve months after date we or either of us promise to pay to the order of the First National Bank of Rapid City, Dakota, five thousand dollars at First National Bank of Rapid City, Dakota, with interest at twelve per cent per annum from June 22, 1889, payable quarterly, until paid for value received with — attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law, and we further waive all benefits of the exemption laws of the territory of Dakota. P. B. McCarthy, Maggie McCarthy, Michael McGuire, and endorsements, P. B. McCarthy & Co., Nov. 27, Int. paid to 11-22, $250; Mch. 22, Int. Pd. to 3-22, 90, $200; Jun. 5, Int. Pd. to 5-22, $100; Sept. 30, Int. paid to Sept. 22, $200; Dec. 23, Int. paid to 12-22, '90, $150. (WITNESS:) This note, Ex. E, was given by Patrick B. McCarthy, Maggie McCarthy and Michael McGuire in settlement of notes which the plaintiff held at the date of this note against P. B. McCarthy & Company; and notes which the bank held against Michael McGuire and Patrick B. McCarthy and D. J. Tighe; the interest endorsements on the back of this note paid the interest on it up to December 22, 1890. On July 22, 1891, it was settled by the defendants, Patrick B. McCarthy and Maggie McCarthy giving the note for $5,000, dated July 22, 1891, which is marked Ex. A and the mortgage described in the complaint, which is marked Ex. B; and the note for $350, dated July 22, 1891, and which is marked Ex. 15. This last note for $350 covered the interest on Ex.
708 E from December 22, 1890, to July 22, 1891." I will ask you if at the former trial you testified to that effect?

Q. I will ask you if at the former trial you testified to that effect?
A. Yes, sir, that is to the best of my recollection.
Q. Then when we had a dispute as to whether the court would adopt our bill of exceptions or Mr. Fowler's you made an affidavit as to the correctness of the matters set out in the bill of exceptions?
A. Yes, sir, I did.

The defendants offer in evidence pages 166 and 166½ of the transcript and record on appeal in this case, being an affidavit of James Halley as to the correctness of the testimony of himself as set out in plaintiff's so called supplemental bill of exceptions, being the portion just called to the attention of the witness*fl*. And the defendants also offer in evidence for the purpose of contradicting the witness the portion of his testimony at the former trial just read in the record.

Redirect examination by Mr. WHITFIELD:

The notes of the case were burned. This statement was made up by my attorneys and from that as a basis I made my evidence. My evidence at this trial, as I remember it, has been given from the books and records of the bank.

MAGGIE MCCARTHY called on the part of the defendant by Mr. BROWN:

My name is Maggie McCarthy, I reside at Rapid City, South Dakota. I am one of the defendants and the wife of the defendant, Patrick B. McCarthy. Have resided in Rapid City fourteen or fifteen years. Most of that time in the property known as the International hotel, of this city, which has been used and claimed as a homestead by my husband and myself. That is my signature on Ex. E with Mr. McCarthy and Mr. McGuire. That was the first large note that I signed. There was no money of any kind paid me when I signed this note. I received no money on signing any of these notes. I did no figuring at the time of the note $5,000 and one for $675 given in February, 1896, with Mr. Halley or any of the officers of the bank as to the amount due at that time. I do not know how they reached
the figures or the balance they claim to be due. I knew noth-
709 ing about it at all and they brought the notes and asked me
to sign them. They were brought to the hotel I think. I think by Mr. Thomas. They were already made out for me to sign, and I simply signed the notes at the time without going into any figures as to how the result was reached. I was not shown any statement of the account showing how they reached the sum mentioned. I think Mr. McCarthy had already signed it.

Recross-examination by Mr. WHITFIELD:

Mr. McCarthy was present when I signed the note. I think there was one signature there when I signed.

Redirect examination by Mr. BROWN:

These last notes were signed by Mr. McCarthy and myself. I didn't look to see who the prior notes were signed by. I just signed them at Mr. McCarthy's request.

Recross-examination by Mr. WHITFIELD:

Mr. McCarthy did the business. I paid no attention to the affairs of the business. I just signed them.

Redirect examination by Mr. BROWN:

I signed them because he asked me to.

JOHN P. MCELROY, Jr., recalled by the defendants.

By Mr. BROWN:

I am the deputy clerk of this court, and for four years prior to January 1, I was clerk of this court. I have a judgment docket here. On page 265 there are judgments docketed against D. J. Tighe. One of March 29, 1883, in favor of S. Karpen & Brothers. That is Dennis J. Tighe. The judgments are against Tompkins & Tighe, formerly co-partners in the furniture business. The amount is $200.75. No execution has been issued on the judgment and no satisfaction filed. Also find another judgment on same page against Tompkins & Tighe in favor of the Union Parlor Furniture Company for $64.89. This judgment is unsatisfied. Find another on the same page of July 29, 1893, in favor of W. S. Peterson, assignee of Dakota Bank, $291.12, execution was issued July 29, 1893, and has never been returned. The whole page of this record is judgments against Tompkins & Tighe. There is a judgment docket against M. Mc-
710 Guire, in favor of Mathushek Piano Company for $308.45. It is unsatisfied. I find another judgment of record against M. McGuire in favor of Herbert N. Johnson, dated September 22, 1894, unsatisfied. Also find a judgment against M. McGuire in favor of the Midland State Bank, dated September 18, 1895, for $10,006.35, satisfied to the amount of $7,982.05, leaving a deficiency of $2,105.62, dated October 28, 1895. This last amount is unsatisfied.

Cross-examination by Mr. WHITFIELD:

He makes the witness his own witness.

I find a judgment of the Bailey Loan Company against P. B. McCarthy and wife for $941.22. I also find a judgment of Fuller & Fuller against P. B. McCarthy for $124.50, and on page 183 I find a judgment against P. B. McCarthy for $112.70 against McCarthy and others. On page 186 of same judgment book I find a judgment there of E. W. Speed, as administrator of the estate of William B. Franklin, deceased, against Patrick B. McCarthy, for $85.

The defendants object to the last entry as it has been reversed by the supreme court of the state and judgment rendered against E. W. Speed and others in favor of McCarthy.

Objection overruled. Defendants except.

I find in the same record a judgment of the Omaha National Bank against P. B. McCarthy $346.25. On the same page an entry of a

judgment of the First National Bank of Rapid City against P. B. McCarthy and wife for $6,464.69.

The defendants object to that as that judgment has been reversed by the supreme court of the state.

Objection overruled. Defendants except.

Redirect examination by Mr. BROWN:

Turn to the record of that Bailey Loan Company judgment against Mr. McCarthy and state if it is satisfied. Satisfied March 22, 1895, by sale of the mortgaged property. The judgment of Fuller & Fuller against McCarthy satisfied to the following amounts: $5.50, $50, $63.63, execution issued December 12, 1893, satisfied to the amount of $63.63, execution again issued January 25, 1895, which has never been returned. The judgment in favor of the
711 Harney Peak Bank against McCarthy was satisfied in full the 23rd day of June, 1892. The judgments of E. W. Speed, as administrator of the Franklin estate, were reversed by the supreme court of the state, and judgment for cost to the amount of $438.55, rendered in favor of McCarthy. This was dated January 13, 1900. The judgment in favor of the Omaha National Bank against McCarthy has been satisfied to the amount of $50. The judgment in favor of the First National Bank of Rapid City against McCarthy, a new trial was granted and the judgment set aside. That case was appealed to the supreme court by the First National Bank and the judgment of the circuit court in granting a new trial was affirmed and judgment was entered in favor of McCarthy and against the bank as costs in the supreme court, amounting to $110.70.

PATRICK B. MCCARTHY recalled by the defendants.

Redirect examination by Mr. BROWN:

I am familiar with the Harney Peak Bank business. This Harney Peak Bank judgment did grow out of this original indebtedness. There is $115 yet unpaid on the Omaha National Bank judgment. I have an arrangement with the attorneys of the bank for an extension of time.

Recross-examination by Mr. WHITFIELD:

The Harney Peak Bank judgment is one of these notes that is made to Lake and Halley and they sent it up there for collection. I don't know the date of it. Think it was for $100. Don't remember who signed it. Think it was taken up by another note. There were some notes given to Lake and Halley as they said they did not want so much money taken out of this bank. I do not know where the note is.

Defendants rest.

JAMES HALLEY re-called in rebuttal by plaintiffs.

Direct examination by Mr. WHITFIELD:

At the time these various payments were made by P. B. McCarthy and P. B. McCarthy & Company the application of it was made by the bank at once. I never made any application of these payments contrary to any direction of Mr. McCarthy at the time, and I never heard any complaint of the entries that we made until this
712 trouble began. Ex. 26 a check of Nov. 30, 1887, apply it on note of interest to Mr. McCarthy. Applied on that date. Ex. 27, a check of January 25, 1888, was the balance of the entries, on four one thousand dollar notes that Mr. McCarthy paid on that date. Applied same date. It did not pay all the interest on these notes. A note of $219 was given at that date. This is the note referred to. The notes of $219 with this $46 exactly paid the interest to that date. Ex. 12, a check of March 12, 1888, for $203, signed by P. B. McCarthy & Company by "T." was applied on the note of P. B. McCarthy & Company for $200 principal and $3 interest. Applied on same date. Ex. 28, a check of P. B. McCarthy, dated April 17, 1888, for $15.75 is an interest check. Ex. 13, a check of $180 of date April 23, 1888, was applied on the payment of interest on the $4,000 notes. Applied on the same date, and our books show that it was so applied at that time. Ex. 29, a check for $12, May 2, 1888, was applied on interest to P. B. McCarthy. Applied on note of $400 of P. B. McCarthy, M. McGuire and D. J. Tighe. Ex. 26, November 30, 1887, defendants' Ex. 5, a note bears the endorsement corresponding to the amount on the date of the payment of the check. Ex. 29, just spoken of for $12. I find the note of which that is a record. It was applied on interest of a $400 note of P. B. McCarthy, M. McGuire and D. J. Tighe. Ex. 30, a check for $26.80, July 20, 1888, was applied on payment of interest on two notes, one for $400, of P. B. McCarthy & Company, and one for $200 of P. B. McCarthy & Company. They paid the interest to that date. Ex. 31, a check Sept. 6, 1888, for $29, applied on payment of interest on P. B. McCarthy's company's note. Ex. 18, check of October 6, 1888, for $609 was in payment of a note of P. B. McCarthy & Company, principal $600 and interest $9. Nine dollars was the exact amount of accumulated interest to that date. Notes surrendered at that time. Ex. 16, a check of August 6, 1888, a check for $76.13, it was charged July 28, 1888, and on that same date there was another check made for $231.81, being a total of $231.81, being Ex. 15. That was given in payment of a note of $219 and interest. Interest 12.18, making a total of $231.81. Exhibit 17, Au-
713 gust 10, 1888, $257.50 check, was in payment of the principal of $250 and interest was $7.50. This was the amount of interest due on the note and was so applied at the time. Check 14, being Ex. 14, for $17.10 August 11, 1888, 212 was applied on payment of interest on P. B. McCarthy & Company's note of $600. That is the correct amount of interest at that date. Ex. 19, check for $100, November 9, 1888, was for interest on P. B. McCarthy & Company's note. I can find from the other book. It was a four

thousand dollar note. Ex. 1 of defendants of November 9, I find an endorsement corresponding to this date and amount. There is no record corresponding with Ex. 32, the check for $14.65 conceded by Mr. McCarthy to be an interest check. No record of any payment on that date. Ex. 32, check for $80, November 22, 1888, was applied on interest of P. B. McCarthy & Company's note. I find the endorsement on Ex. 1 of defendants. Same date and amount. Again turning to December 19, 1888, Ex. 20, check for $318.15 was applied on the payment of several small notes, one of George W. Burch, $16.65 principal and sixty cents interest, one by Somerud for $68.65 with $2.35 interest, and a note given by P. B. McCarthy & Company for $20 and $4.50 interest and a note given by Jennie E. Franklin for $100 and interest $4.50. The above items are the correct amount computed to that time and the aggregate makes even this sum. I find an entry of a payment of Ex. 23 of $250. This check was applied on interest of P. B. McCarthy & Company's note and I have an endorsement of like amount of Ex. 15, which is as follows: November 27, interest paid to November 22, $250, the check and entry correspond. On February 6, 1898, record of Ex. 22, $180. I find an application of that amount. On defendants' exhibit 1 a note of $4,000 which reads as follows: February 6 interest paid to February 3, $180. This check corresponds with that. I have Ex. 1 in my possession. I surrendered and cancelled it. Ex. 21, a check of $29.65 January 19, 1889, $23 was applied of that as a part payment of the $423 note of P. B. McCarthy & Company and $6.25 on the interest. This was the amount of interest computed
714 to that date, and the $23 was applied on the principal. Ex. 24, a check for $200 March 22, 1890, referring to our Ex. "E." At that date we changed the past collection and got a book for the bank paper alone. Now we have the bank paper separate from all other papers. No difference in the record. I find the corresponding payment of interest on the $5,000 note Ex. "E": It is the application of that check, and reads March 22, interest paid to March 22, 1890, $200. This corresponds with the check. Under date of June 5, 1890, I find the entry of the application of Ex. 25 for $109, applied on the interest of P. B. McCarthy & Company on the $5,000 note, and a corresponding entry on Ex. "E," interest paid to May 22. This was the amount of interest due at that time. That is the application made at that time. I find under date of November 17, 1888, no application of exhibit 9, being a note of McCarthy & Company for $100. He made no payment whatever. If he had made any application of interest or anything else, it would have been on our books. I do not know about exhibits 34 and 35 for $500 each, made to Richard C. Lake and James Halley. I see these notes are drawn by Mr. Lake and at that time we were conducting a partnership bank at Buffalo Gap, and what these notes were given for I could not say. We did not make a settlement with Mr. McCarthy of these of May 22, 1889, I don't think we did. We frequently made loans through Lake and Halley for the First National Bank. We frequently took loans for Lake and Halley not made with their money. I did not dare Mr. McCarthy to leave the

Bank until he gave me a check for $180. I don't know that I ever did. I have not been used to doing that kind of a thing to patrons of the bank. I did not do it. After I heard Mr. McCarthy's testimony in reference to the letter he says I wrote to Mr. Lake at Hot Springs in July, 1893, and while he was there, Mr. Lake handed him the letter for reading, and called upon him for money. After hearing his testimony I sent for the letter press book and examined it fully, and I find nothing of the kind. I wrote a letter to Mr. McCarthy at that time which I find in the copy book. This is the copy book. Letter is addressed to P. B. McCarthy at Hot Springs, South Dakota. Letter is as follows, which was read to the
715 jury:

"RAPID CITY, SOUTH DAKOTA, *July* 5, 1893.

P. B. McCarthy, Esq., Hot Springs, South Dakota.

DEAR SIR: Messrs. Seip and Keenan inform me that they have paid you the rent this month and as you agreed to turn in this rent to us monthly on account of the mortgage, we will expect you to remit at once, otherwise we will commence the foreclosure of the mortgage.

(Signed) JAMES HALLEY, *Cashier.*"

I find no letter to Mr. Lake of that date. As a result of that letter he handed $50 to Mr. Lake at Hot Springs. At least Mr. Lake sent it up and told us to credit it to Mr. McCarthy. I find in referring to our exhibit "A" the $50 endorsed upon that note, under date of July 10, 1893, paid on account of interest. Since giving my testimony last Saturday I have looked up the record of the sale of the Addie mine in which McGuire and McCarthy sold an interest. I don't know that Mr. McCarthy had any interest in the matter at all. Mr. McGuire instructed me. He gave a personal draft for $2,500. McGuire and Challis sold an interest during May or June, 1889, I think to Mr. Wilson for $2,500, accepting in payment Wilson's two notes of $1,250 each, one payable to W. W. Challis and one payable to M. McGuire. And later on McGuire was manager of the Box Elder Land & Live Stock Company and sold Mr. Challis an interest in the company for his note, so that the Box Elder company became the owner of this $1,250 note that had belonged to Challis, and the other belonged to Mr. McGuire. And some time before the notes were due they came into the bank and called for the notes. They were trying to get Wilson to pay the notes, and agreed to discount them $100 if he would give the draft for them, and he agreed to and so that in the bank in the presence of Mr. Fowler and myself on behalf of the Box Elder company credit was given to their note of $50 and credit to our note of $50, if Wilson would give us his draft on New York for the amount of the notes, which would be $1,200 each, and Wilson accepted that and gave the draft, and the
Box Elder Land & Live Stock Company discounted that in
716 the bank and the bank discounted it a quarter of one per cent. Mr. McGuire instructed us to credit P. B. McCarthy for one-half of the amount which we did and the books show it, and reads as follows: To $598.50 credit to P. B. McCarthy by $1.50 less

$600 being the discount. This was placed to Mr. McCarthy's credit. That is on page 341 of the individual journal of the bank under date of June 18, 1889, and that entry is as it was originally made, and was as directed by Mr. McGuire. We had no notice of Mr. McCarthy's interest except as received from Mr. McGuire. This was placed to Mr. McCarthy's personal credit and subject to check. The remaining amount $598.50 of Mr. McGuire's was credited the same way and subject to check, and was afterwards checked out by the respective parties. I heard Mr. McCarthy's testimony in reference to the sale of certain lots for $800, $200 to be paid as attorney fees to Mr. Fowler and $600 credited on this account. The fact is that the whole $800 is placed to Mr. McCarthy's account subject to check. There was no direction by him to the bank to credit it on his indebtedness, and it was not paid on the bank indebtedness. I have the book here showing the facts, which are as follows: January 30, 1890, $800 credited to Mr. McCarthy's account on that day. On the same day he gave an order to Mr. Fowler to have $300 of it. It was all checked out by Mr. McCarthy. The record read in evidence is a follows: Individual journal page 341, Box Elder Company credit, by Wilson draft, $1,197; M. McGuire by Wilson $587.50; P. B. McCarthy by Wilson $598.50, the individual ledger page 30, P. B. McCarthy's account shows a credit on the same date, June 18, transferred from the journal $598.50 by Wilson. Then in the individual ledger of 1890, page 333, credit $800 to P. B. McCarthy. That is the ordinary way of keep- individual accounts in the bank, whether it is paid in in money or notes deposited. I did not copy there the name of each check. The bank does frequently for monthly settlements and write up in their pass book and turn them in and if there is any errors there, to have them corrected. I never treated Mr. McCarthy any different from any other patrons of the bank. Never tried to use him. I had nothing to do with
717 Mr. McCarthy's election to the council or the council. I was cashier of the bank at that time. Mr. Lake was president. I had no supervision over Mr. Lake. I was an inferior officer while he was president.

Recross-examination by Mr. SMITH:

The entry is made under the column headed interest, and the check is charged to the account the same day, and we have examined the books and find there they are the only checks given us so that there is no doubt about that. I don't draw any inference about it. I don't have to. I see by the records that exhibit 22, dated February 6, 1889, of $180 was paid on interest and marked so in Mr. Lake's hand writing, and under the head of interest.

Mr. SOMERS recalled by plaintiff.

Redirect examination by Mr. WHITFIELD:

I heard Mr. McCarthy's testimony yesterday in regard to his never having reduced the rent of Mr. Keenan. My rent record shows that it was $40 a month when I first took charge of it. I heard McCarthy testify that he never reduced it. I had several conversations

with Mr. McCarthy about it. Keenan refused to pay the amount he was paying, and I referred the matter to McCarthy. I went to see him and after several days' delay and seeing him again he finally agreed to it. Then it was reduced to $25 per month and Keenan paid at that rate until he ceased paying. Total amount paid by Keenan was $613. Mr. Fowler was not an officer of the bank at that time. He was not in charge of the rent collection. It was never reduced other than at the time the bank had charge of it, from $40 to $25.

The plaintiff now offers in evidence from the original files of this case the notice of intention to move for a new trial. Motion for a new trial, order granting motion for a new trial, the last being dated June 18, 1898, notice of appeal to the supreme court and undertaking on appeal with proof of service and the endorsement on each instrument. Dated July 21, 1898, clerk's certificate to the original files, naming those instruments and transmitting the same with the records to the Supreme Court of Appeal, also the remittitur from the Supreme Court in this case, dated August 11, 1900, filed
718 in this court August 16, 1900, the same being marked plaintiff's Ex. "J." Also offer the original answer of P. B. McCarthy and Maggie McCarthy, the original having been destroyed and ask that the duly certified copy which is in the original transcript and record be used in lieu of the original and also offer Ex. 1 and separate answers of P. B. McCarthy and Maggie McCarthy to the supplemental complaint, the last two instruments being offered and used simply and solely to contradict the witness P. B. McCarthy, said answer theretofore being by him verified, and he therein alleges that the payment of the $1,675 was paid as usurious interest by P. B. McCarthy, and that the aggregate of $2,500 and upwards of usurious interest was paid by P. B. McCarthy & Co. upon the same indebtedness. And the defendant not being bound by such in any sense except for that purpose. Also offer in evidence the special execution in the case of P. B. McCarthy against M. McGuire with the sheriff's return of sale and the confirmation of sale, which is marked Ex. "K," also offer in evidence the special execution and sheriff's report of sale together with the order of confirmation of sale in the case of P. B. McCarthy against D. J. Tighe, together with the record thereof Ex. "L," also offer in evidence Ex. "E," a note dated May 28, 1889, for $5,000, signed by P. B. McCarthy, Maggie McCarthy and M. McGuire, payable twelve months after date to the First National Bank together with the endorsements upon the same.

PATRICK B. MCCARTHY being recalled testified:

Redirect examination by Mr. BROWN:

I heard Mr. Halley testify in reference to the mine deal. If the court will permit me to explain the matter Mr. J. P. Morgan when he left here told me to get the money and send it to him, which I done. He made it payable to me, and it came in installments. The amount less the bank's interest was $598.50. I received it in the summer or fall of 1889. Mr. Halley was aware of this money coming through the bank and he says to me leave this money in

here and it will help your credit, and will help out in the bank because the examiner is coming shortly, and I want the bank to
719 look all right. He said you can check it out later. I checked it out the following March. This had nothing to do with the Addie mine deal. I have the check here. Check to J. P. Horgan and paid. Horgan endorsed it out there I presume. I got it for the sale of his interest from the Martha Washington group of mines. The stub to this check reads as follows: Paid to J. P. Horgan on his interest on Martha Washington group of mines $598.50. That is the second check of this amount. The other check is lost. I can't find it. That is the money Mr. Halley refers to that is checked out. They had nothing to do with the Challis and McGuire mining deal of July 3, 1889. That was a sale of the Addie mine and this was the Martha Washington group. I got another check of $2,150 to settle up this Martha Washington deal and another check. I had no conversation with Mr. Halley as he testified in rebuttal in reference to sundry payments made which he said was the exact amount of interest due. I made the payments to Halley and he divided them up to suit himself. In reference to that letter which Lake showed me at Hot Springs, Lake handed me the letter. It was never mailed to me.

Recross-examination by Mr. WHITFIELD:

That credit that I got there was through this Martha Washington deal. I claim that the credit of $598.50 was not from the Addie. There were two $598.50 checks. My idea is that you have confused this Horgan deal and trying to get this Addie deal mixed up with it. My account of the Addie mine was $1,250. McGuire did the business for you. I don't know anything about the note. He told me he had placed $1,250 to my credit in the bank. The sale for the Addie was for $5,000. McGuire has testified that he sold it for $5,000, and he got $2,500 for himself and me. Challis only sold $1,000 of his interest to the Box Elder company, so McGuire says, that is all I know about it. This Martha Washington deal was separate and distinct from the Addie deal, and I had in addition to the $598.50 checks a check for $1,250. I don't know what date it was. My check book does not show. This check book is played out, and
720 I can't find the others. I lost a bundle of checks and if I had not I would get two thousand dollars more than what I will on what I was paid.

Redirect examination by Mr. BROWN:

There were two of these Horgan checks of $598.50, and one for $1,250. If I had known of this other business I would have written and found out. This was just called to my attention this morning.

Defendants offer in evidence the check together with the stub of the check, which was read in evidence.

CHARLES W. BROWN called on behalf of defendant:

I reside in Rapid City, South Dakota. Am a lawyer. Have been engaged in the practice of my profession since the spring of 1887. I was employed by Mr. McCarthy some time in June or July, 1898, and answered for him in a case brought by the First National Bank plaintiff, here, against Patrick B. McCarthy and Maggie McCarthy, being an ejectment suit to oust these defendants from the premises described in the complaint in this action. No notice of motion or anything of the kind was ever served upon me to dismiss that action. I first heard of it when we had a hearing in this case for leave to file a supplemental complaint and answer in this case. The assignment of a judgment in favor of P. B. McCarthy, M. McGuire and D. J. Tighe, co-partners of P. B. McCarthy & Company and against William Franklin and Jennie E. Franklin, which you hand me. It is in my hand writing, prepared by me. The day we got the judgment and when I was at the old desk there it was delivered according to my recollection by Mr. McCarthy and myself to Mr. Halley at the bank. I think Mr. Halley stated the same thing. There was nothing at that time said about the application of this money to the bank. There was later. I would like to explain. The assignment was made at my suggestion, the judgment having been obtained in the name of P. B. McCarthy & Company. McGuire and Tighe had just as much authority to satisfy this judgment as McCarthy did, and when I filed the judgment at the clerk's desk, M. McGuire and his attorney, Mr. Fowler, were standing near the desk, and I advised McCarthy to make an assignment of it, and make it quick,
721 and he did so that same day, and I went up with him to see Mr. Halley. Later on when some question came up as to the costs of sale to come out of this and the attorney's fee coming to me. Mr. Halley made a statement that it was assigned to apply upon the account of P. B. McCarthy & Company. That statement was made shortly after this assignment.

JAMES HALLEY recalled by plaintiff.

Redirect examination by Mr. WHITFIELD:

I have examined check marked Ex. 43 by the defendants and have referred to the book and state that it is not the same transaction which we have accounted for as the sale of Mr. McCarthy's portion of the Addie, as directed to be entered by Mr. McGuire. It is not the same date. It is six or seven months later. The money deposited by Wilson was all checked out before this date. The Horgan matter appears on the individual ledger of 1890 on page 323. I find on same page the credit of the check of $2,150 of McCarthy and checked out the same day it was credited. This $598.50 was checked out the same day it was deposited, March 31, 1890. The check was paid that day. Horgan got the money himself. It is not the same date as the other $598.50. That appears on another ledger and is further designated by the Wilson draft. There can be no question of a confusion or mistake of overcharging these items to the different amounts. The amount of money was all checked out and the

account balanced of July of the same year. Our bank books are subject to an examination of a government inspector twice each year. That is true of all these books. The state bank inspector does not affect national banks.

Both sides rest.

EXHIBIT 25.

Judge's Certificate to Bill of Exceptions.

The foregoing bill of exceptions in said action having been duly proposed and served within the time allowed by law, and the amendments thereto proposed by the plaintiff having been in part adopted by the court and incorporated in said bill of exceptions, and the settlement of said bill of exceptions coming on regularly to be heard, pursuant to notice and the stipulation of the parties, before
722 the undersigned, the judge of the above entitled court, who heard and tried said action, Mr. Fred H. Whitfield appearing for the plaintiff and Mr. Charles W. Brown appearing for the answering defendants, and I being fully advised in the premises, and being satisfied that the said bill of exceptions as here and now presented, is a full, true and correct bill of exceptions, containing the various order- and decisions of the court, with the objections and exceptions thereto, and the entire charge of the court to the jury, with the exceptions thereto, and containing likewise all the testimony or evidence introduced or offered at the trial of said action, the said bill of exceptions is hereby allowed signed and sealed, and made a part of the record and judgment roll in said action.

Done at Rapid City, S. D., this 9th day of November, A. D. 1901.

By the court:

LEVI McGEE, *Judge.*

EXHIBIT 26.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. McCARTHY and MAGGIE McCARTHY et al., Defendants.

Motion for New Trial.

Take Notice, that the defendants, Patrick B. McCarthy and Maggie McCarthy, will move the court at its chambers in the City of Rapid City, South Dakota, on the 19th day of November, A. D. 1901, at two o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, to vacate and set aside the verdict herein and the judgment rendered thereon, and to grant a new trial of this action upon the following grounds, and for the following causes,

materially affecting the substantial rights of the answering defendants, to-wit:

I.

723 The evidence is insufficient to justify the verdict of the jury and the decision of the court, and the said verdict and decision are against law, in the following particulars:

1. It appears by the clear preponderance of the evidence, and the court and jury should have found that the note for $5,000 dated July 22, 1890, described in the second paragraph of the supplemental complaint, was a renewal of the note for $4,000, dated August 7, 1888, and executed by P. B. McCarthy & Co., P. B. McCarthy, M. McGuire, and D. J. Tighe, and payable to the order of the plaintiff ninety days after said date, with interest thereon at eighteen per cent per annum from said date until paid, and described in the second paragraph of the amended answer to the supplemental complaint.

2. It appears by the clear preponderance of the evidence, and the court and jury should have found, that the said note for $4,000, dated August 7, 1888, was a renewal of four certain original promissory notes, each executed by Patrick B. McCarthy by the name of P. B. McCarthy, dated August 22, 1887, each for the sum of $1,000, and each and all bearing interest at the rate of eighteen per cent per annum from said last named date until paid, and described in the second paragraph of the amended answer to the supplemental complaint.

3. It appears by the clear preponderance of the evidence and the court should have found, that the inception of the said indebtedness of the defendants, Patrick B. McCarthy, was said four notes of P. B. McCarthy, each for $1,000, dated August 22, 1887, and bearing interest at eighteen per cent per annum; that McCarthy's said four original notes were taken up and renewed by a note for $4,000 dated January 24, 1888, signed by P. B. McCarthy, P. B. McCarthy & Co., Michael McGuire and D. J. Tighe, and bearing interest at eighteen per cent per annum; that said last named note was renewed April 23, 1888, by a note for $4,000, signed by said parties last named and bearing interest at eighteen per cent per annum, which last note was again renewed August 7, 1888, by a $4,000 note signed by the said parties last named, and bearing interest at 18 per
724 cent per annum, that said $4,000 note of August 7, 1888, was renewed by a note of $5,000 dated May 22, 1889, signed by Patrick B. McCarthy, Maggie McCarthy and Michael McGuire, and bearing interest at twelve per cent per annum, being the first note bearing interest at less than eighteen per cent per annum; that the consideration of said $5,000 note of May 22, 1889, was the said original indebtedness of $4,000 or a part thereof, together with the accumulations of usurious interest thereon; that said note of $5,000 of date May 22, 1889, was renewed by a note of $5,000 dated July 22, 1891, and signed by the answering defendants, being the note sued on herein and bearing even date with said mortgage; that said last named note was renewed by two notes, one for $5,000 and one for

$675.50 dated February 17, 1896, and described in the supplemental complaint; that all the said notes subsequent to August 22, 1887, were given as substitutes for the said four notes of P. B. McCarthy, each for $1,000 dated August 22, 1887, and evidenced the said original loan of $4,000 made on August 22, 1887, by the plaintiff to the defendant, Patrick B. McCarthy, together with the accumulations of interest thereon; that the defendant, Patrick B. McCarthy, was at all times the principal in said indebtedness represented by said several notes, and the other signers of said notes are and were sureties only with the said Patrick B. McCarthy; that none of the said notes were given or received as payment of said four original notes of date August 22, 1887, but that all of said notes were given as renewals of and substitutes for said four original notes; that the sole consideration for the notes described in the supplemental complaint was the original indebtedness (or such part thereof, if any, as was owing to the plaintiff at the time of the making of said last named notes) evidenced by said four notes of date August 22, 1887.

4. It appears by the clear preponderance of the evidence, and the court and jury should have found, that the defendant, Patrick B. McCarthy, made sundry general payments upon the said indebtedness, without any direction as to the application thereof, as follows, to-wit:

725

By order on James Keenan for rent	$719.40
By order on M. F. Hill	205.50
By order on Tracey & Seip	30.00
By assignment of Franklin judgment	500.65
To Richard C. Lake on July 3, 1893, at Hot Springs, S. D.	50.00
By Smith & Brown order	30.00
By Kelley order	125.00
	$1,660.55

and that the said defendant, Patrick B. McCarthy, in addition to the said sum of $1,666.55, made further general payments upon the said indebtedness, without any direction as to the application thereof, amounting to $5,798.12; said general payments so made as aforesaid amounting in the aggregate to the sum of $7,458.67.

5. It appears by the clear preponderance of the evidence, and the court and jury should have found, that the plaintiff did not pay the taxes in the supplemental complaint mentioned as mortgagee for the purpose of protecting the mortgage security, or under the provisions of its said mortgage; that on the contrary, the plaintiff purchased from Pennington county the tax sale certificate mentioned in the amended answer to the supplemental complaint, and took the tax deed mentioned and alleged in the answer, and commenced against the answering defendants the ejectment suit mentioned and alleged in the said answer, for the sole purpose of acquiring a tax deed and tax title to the said mortgaged premises, and possession of said premises under said deed and title.

II.

The answer of the jury in response to said Question 1, and the court's findings adopting said answer, are contrary to the evidence, and are not sustained by the evidence, and are contrary to law, in the particulars hereinbefore specified.

III.

The answer of the jury in response to Question 2, and the court's findings adopting the said answer, are contrary to the evidence, and are not sustained by the evidence, and are contrary to law, in
726 the particulars hereinbefore specified.

IV.

The answer of the jury in response to Question 3, and the court's finding adopting the said answer, are contrary to the evidence, and are not sustained by the evidence, and are contrary to law in the particulars hereinbefore specified.

V.

The answer of the jury in response to Question 4, and the court's finding adopting the said answer, are contrary to the evidence, and are not sustained by the evidence, and are contrary to law in the particulars hereinbefore specified.

VI.

The verdict of the jury, in answer to said questions one and two, is contrary to the instructions of the court, and was rendered under a disregard or misapprehension of said instructions.

VII.

The verdict of the jury, in answer to said questions three and four, is contrary to the instructions of the court, and was rendered under a disregard or misapprehension of said instructions.

VIII.

There was such a plain disregard by the jury of the instructions of the court or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of said instructions, or under the influence of passion or prejudice.

IX.

The court's said finding of fact numbered eleven, approving and adopting the said verdict of the jury, is contrary to the evidence, and is not sustained by the evidence, and is against law, in the particulars and for the reasons hereinbefore specified.

X.

The court erred in making the said order of May 18, 1901, denying and overruling the said motion of the answering defendants to vacate and set aside the said verdict of the jury upon the four special issues submitted to the jury by the order of the court, for the reasons and in the particulars hereinbefore specified, and for the further reason that there was, as shown by the affidavits served and
727 filed by the plaintiff herein, such irregularity in the proceedings of the court, and in the proceedings of the jury, and in the proceedings of the plaintiff and its counsel, as prevented the said answering defendants from having a fair trial.

XI.

The court erred in sustaining the objection of the plaintiff to the following question propounded to the witness, James Halley, on his cross-examination, towit: "Q. I understand you to state that there were numerous payments endorsed on that note Exhibit A, I will ask you if on or about March 1, 1888, Mr. McCarthy paid you $203?" Which question, objection and ruling appear on page 4 of the bill of exceptions herein.

XII.

The court erred in overruling the motion of the defendants to strike out the following answer of the witness Halley, on his cross-examination, to-wit: "The loan of 1891 was made to Mrs. McCarthy, P. B. McCarthy, and the loan of 1889 was made to McCarthy & McGuire," as a conclusion of the witness and not responsive to the question; which question, answer, motion and ruling, appear on page five of the bill of exceptions herein.

XIII.

The court erred in sustaining the objection of the plaintiff to the following question propounded to the witness Halley, on his cross-examination, to-wit: "Q. If McCarthy was a principal in that $4,000 note of January 24, 1888, then his original debt never has been paid, has it?" Which question, objection and ruling appear on page seven of the bill of exceptions herein.

XIV.

The court erred in permitting the plaintiff to offer in evidence and read to the jury the mortgage, Ex. F, dated February 17, 1896, against the objection of the answering defendants; which offer, objection and ruling appear on page 31 of the bill of exceptions herein.

XV.

The court erred in overruling the objection of the answering defendants to the following questions, propounded to the wit-
728 ness Somers, on his cross-examination, to-wit:

"Q. For what purpose were the taxes paid on the premises?

Q. And but for that mortgage and the bank's interest, would the bank have paid those taxes?

Q. It was for the protection of the mortgaged property, and for the mortgagee's interest, if you know?"

Q. Was the payment of the taxes for the protection of the bank's interest, if you know?"

Which questions, objections and rulings appear on page 32 of the bill of exceptions herein.

XVI.

The court erred in overruling the objections of the answering defendants to Ex. H, being the order dismissing the ejectment suit between the plaintiff and the answering defendants; which offer, objections and ruling appear on page 33 of the bill of exceptions herein.

XVII.

The court erred in overruling the objections of the answering defendants to the offer in evidence of the endorsements upon the notes, Ex. A, C and D, as being self serving declarations of the plaintiff; which offer, objections and rulings appear on pages 33 and 34 of the bill of exceptions herein.

XVIII.

The court erred in sustaining the objections of the plaintiff to the following question, propounded to the witness Somers, on his cross-examination, to-wit: "Q. State as near as you can the contents of that order to the jury?" which question, objection and ruling appear on page 36 of this bill of exceptions.

XIX.

The court erred in sustaining the objections of the plaintiff to the following answer given by the witness Somers, on his cross-examination, to-wit: "A. I presume it was of the same general form, this calls for a specified sum;" which answer, objection and ruling appear on pages 36 and 37 of the bill of exceptions herein.

XX.

The court erred in sustaining the objection of the plain-
729 tiff to the offer in evidence of the memorandum Ex. 11; which objection and ruling appear on page 81 of the bill of exceptions herein.

XXI.

The court erred in refusing to make finding of fact numbered one, requested by the answering defendants, and set out on page 174 of the bill of exceptions herein.

XXII.

The court erred in refusing to make finding of fact numbered two, requested by the answering defendants, which proposed finding is set out on pages 174 and 175 of the bill of exceptions herein.

XXIII.

The court erred in refusing to make finding of fact numbered three, requested by the answering defendants, which proposed finding is set out on pages 175 and 176 of the bill of exceptions herein.

XXIV.

The court erred in refusing to make finding of fact numbered four, requested by the answering defendants, which proposed finding is set out on page 176 of the bill of exceptions herein.

XXV.

The court erred in refusing to make finding of fact numbered five, requested by the answering defendants, which proposed finding is set out on page 176 of the bill of exceptions herein.

XXVI.

The court's said findings of fact numbered two, three, six, seven, eight, ten, eleven, twelve, and thirteen, and each thereof, are contrary to the evidence, and are not sustained by the evidence, and are against law, in the particulars and for the reasons hereinbefore specified.

XXVII.

The court's said conclusions of law, numbered one, two and three, and each of them, are not sustained by the evidence, and are against law in the particulars and for the reasons hereinbefore specified.

XXVIII.

The judgment of the court, for all the reasons hereinbefore
730 assigned, as against law and contrary to the evidence.

XXIX.

Irregularity in the proceedings of the court, by which the answering defendants were prevented from having a fair trial, as shown by the affidavits heretofore served by the answering defendants in support of their motion to vacate and set aside the verdict of the jury upon the four special issues submitted to the jury herein, to-wit: the affidavit of William Hall, verified March 26, 1901; the affidavit of John Hedlun verified March 28, 1901; the affidavits of Patrick B. McCarthy, Edmund Smith and Charles W. Brown, verified April 3, 1901; and the affidavit of Patrick B. McCarthy verified April 30, 1901, being the affidavits used in support of the defendants' motion to vacate and set aside the said verdict of the jury.

XXX.

Irregularity in the proceedings of the jury by which these defendants were prevented from having a fair trial, as shown by the said affidavits of William Hall, John Hedlun, Patrick B. McCarthy, Edmund Smith and Charles W. Brown.

XXXI.

Irregularity in the proceedings of the plaintiff and its counsel, by which these defendants were prevented from having a fair trial, as shown by the said affidavits last mentioned.

Said motion will be made upon the bill of exceptions now settled and filed herein, and upon the pleadings and judgment roll herein, and upon the said affidavits last above mentioned.

Dated at Rapid City, S. D., this 11th day of November, A. D. 1901.

CHARLES W. BROWN,
EDMUND SMITH,
Attorneys for Answering Defendants.

To Messrs. Fowler & Whitfield, and Martin & Mason, Attorneys for plaintiff.

731 EXHIBIT 27.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,
vs.
PATRICK B. MCCARTHY and MAGGIE MCCARTHY, et al., Defendants.

Order.

Now, on this day, coming on regularly to be heard, pursuant to notice duly served, and the stipulation of the parties, the motion of the answering defendants, Patrick B. McCarthy and Maggie McCarthy, to vacate and set aside the verdict and decision herein, and the judgment rendered thereon, and to grant a new trial of this action: Messrs. Charles W. Brown and Edmund Smith appearing for said answering defendants in support of said motion, and Mr. Fred H. Whitfield appearing for the plaintiff in opposition thereto: and the court having heard the arguments of counsel, and being fully advised in the premises, it is by the court considered and ordered that the said motion be and the same hereby is in all things overruled and denied.

Done in open court at Rapid City in said county this 14th day of December, A. D., 1901.

By the Court,

LEVI MCGEE, *Judge.*

Attest:

[SEAL.] WILLIAM P. BAKEN, *Clerk.*

To which order and ruling the answering defendants, Patrick B. McCarthy and Maggie McCarthy, and each of them, at the time duly excepted, and at their request this exception is signed and allowed.

By the Court,

LEVI McGEE, *Judge.*

732 EXHIBIT 28.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. McCARTHY and MAGGIE McCARTHY, et al., Defendants.

Order Fixing Amount of Supersedeas upon Appeal.

Now on this day, after the overruling of the motion of the answering defendants, Patrick B. McCarthy and Maggie McCarthy, for a new trial in this action, this cause coming on regularly to be heard upon the application of the said answering defendants for an order fixing the amount of the supersedeas undertaking upon the appeal herein pursuant to Section 5224 of the Compiled Laws, and the other statutes in such case made and provided, the answering defendants appearing by Charles W. Brown and Edmund Smith, their attorneys, and the plaintiff appearing by Fred H. Whitfield, its attorney, and the answering defendants having filed herein and presented to the court upon said application the affidavits of Patrick B. McCarthy, Geo. C. Hunt, John R. Barker, Geo. F. Schneider, H. C. Gambrill, S. J. Scriber and William Gardner, and the plaintiff having presented and filed herein in opposition to said application the affidavits of James Halley, H. W. Somers, J. J. McNamara, J. D. Lake, Fred H. Rugg, V. T. Price, Geo. B. Bennett, G. Schnasse, William Gardner, and the certificates of L. C. Trowbridge, county auditor, and Chas. P. Tittle, county treasurer; and the court having heard and considered the said showing and the affidavits and certificates, and being fully advised in the premises, and being satisfied that the amount of said supersedeas undertaking should be fixed in the sum of four thousand dollars—

It is by the court ordered that the amount of the said supersedeas undertaking upon appeal be, and the same hereby is fixed at the sum of four thousand dollars, and that the said supersedeas undertaking upon appeal shall be conditioned for the payment of any
733 deficiency which may arise upon the sale of the mortgaged premises described in the judgment of foreclosure herein, not exceeding the said sum of four thousand dollars, if the said judg-

ment be affirmed or the said appeal be dismissed, and all costs and damages which may be awarded to the respondent on such appeal.

Done in open court this 17th day of December, A. D. 1901.

By the Court,

LEVI McGEE, *Judge.*

Attest:

WILLIAM BAKEN, *Clerk.*

Filed Dec. 18, 1901. William P. Baken, Clerk. Ent. Judgment Book No. 1, page 490.

EXHIBIT 29.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff and Respondent,

versus

PATRICK B. McCARTHY, MAGGIE McCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson, Solomon Karpen; Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel, Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants; Patrick B. McCarthy and Maggie McCarthy, Appellants.

Notice of Appeal.

Take notice that the answering defendants, Patrick B. McCarthy and Maggie McCarthy, hereby appeal to the supreme court of
734 the State of South Dakota, from the judgment of said circuit court, made and dated herein on the 18th day of May, 1901, and thereafter on the 18th day of May, 1901, entered herein in Judgment Book No. 9, at page 354, et seq. and finding and adjudging that there is due from the said Patrick B. McCarthy and Maggie McCarthy to the plaintiff, upon the notes and mortgages described in the complaint, the sum of eleven thousand, one hundred and seven dollars and eighty-five cents, and ordering, adjudging and decreeing that the foreclosure and sale of the mortgaged premises described in the complaint to satisfy the said judgment, and the recovery by plaintiff from the defendants and appellants, Patrick B. McCarthy and Maggie McCarthy of the sum of one hundred and thirteen dollars and forty-five cents costs and disbursements of this action, and adjudging and decreeing other relief in said judgment specified; and from the order of said circuit court, made and entered herein on the 18th day of December, 1901, overruling and denying the motion of

the said defendants, Patrick B. McCarthy and Maggie McCarthy, for a new trial of this action and from the whole and every part of said judgment and order. And further take notice that upon said appeal the said defendants and appellants, Patrick B. McCarthy and Maggie McCarthy will insist upon a review and reversal, by the said supreme court of the whole and every part of the said judgment and order, and of the verdict and decision upon which the said judgment was rendered and entered.

Dated at Rapid City, South Dakota, this 19th day of December, A. D. 1901.

CHARLES W. BROWN,
EDMUND SMITH,
Attorneys for Defendants.

To Messrs. Martin & Mason, and Fowler & Whitfield, Attorneys for said Plaintiffs.

And to William P. Baken, Clerk of said Circuit Court.

EXHIBIT 30.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

735 FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff and Respondent,

versus

PATRICK B. McCARTHY, MAGGIE McCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson, Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants; Patrick B. McCarthy and Maggie McCarthy, Appellants.

Undertaking Upon Appeal.

Whereas on the 18th day of May, A. D. 1901, in the said circuit court within and for the said County of Pennington, the above named plaintiff and respondent recovered a judgment against the above named defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, finding and adjudging that there is due from the said Patrick B. McCarthy and Maggie McCarthy to the plaintiff upon the notes and mortgages described in the complaint the sum of eleven thousand one hundred and seven dollars and eighty-five cents, and ordering and decreeing the foreclosure and sale of the mortgaged premises described in the complaint to satisfy said judg-

ment, and the recovery of the plaintiff from the defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, in the sum of one hundred and thirteen dollars and forty-five cents, costs and disbursements of this action, and adjudging and decreeing other relief in said judgment specified; and whereas, the said circuit court on the 18th day of December, A. D. 1901, made and entered
736 an order overruling and denying the motion of the defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, for a new trial of said action, and whereas, the above named defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, feeling aggrieved thereby, intend to appeal from the whole and every part of said judgment and order to the supreme court of the State of South Dakota:

Now, therefore, we do hereby undertake, promise and agree that the said defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, *to* pay all costs and damages that may be awarded against them, or either of them upon said appeal or on a dismissal thereof, to not exceed the sum of two hundred and fifty dollars; and we do further undertake, promise and agree that the said defendants and appellants, Patrick B. McCarthy and Maggie McCarthy, will pay any deficiency which may arise on the sale of the mortgaged premises described in said judgment of foreclosure, not exceeding the sum of two thousand dollars, if the said judgment be affirmed or the said appeal be dismissed, and all costs and damages which may be awarded to the respondents upon such appeal.

Dated at Rapid City, South Dakota, this 18th day of December, A. D. 1901.

PATRICK B. McCARTHY.
MAGGIE McCARTHY.
CORNELIUS J. HORGAN.
JOHN CLOWER.
ZACHARIAH HOLMES.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

On this 19th day of December, A. D. 1901, before me, Charles W. Brown, a notary public within and for said county and state, personally appeared Patrick B. McCarthy, Cornelius J. Horgan, John Clower and Zachariah Holmes, known to me to be the persons who are described in and who executed the within and foregoing undertaking, and severally acknowledged to me that they executed the same.

[SEAL.] CHARLES W. BROWN,
Notary Public.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

737 Cornelius J. Horgan, John Clower and Zachariah Holmes, being severally duly sworn each for himself and not one for the other, upon his oath says: The said Cornelius J. Horgan for

himself says that he is a resident and freeholder within said state and that he is worth the sum of four thousand, two hundred and fifty dollars over and above all his debts and liabilities in property within said state, not by law exempt from execution, and the said John Clower for himself says, that he is a resident and freeholder within said state, that he is worth the sum of four thousand two hundred and fifty dollars over and above all his debts and liabilities in property within this state not by law exempt from execution, and the said Zachariah Holmes for himself says that he is a resident and freeholder within said state, and that he is worth the sum of four thousand two hundred and fifty dollars over and above all his debts and liabilities in property in this state not by law exempt from execution; and the said affiants further say that they are the sureties named in and who executed the foregoing undertaking, and that they each and all reside in the City of Rapid City in said County of Pennington and State of South Dakota.

CORNELIUS J. HORGAN.
JOHN CLOWER.
ZACHARIAH HOLMES.

Subscribed and sworn to before me this 19th day of December, A. D. 1901.

[SEAL.] CHARLES W. BROWN,
Notary Public.

EXHIBIT 31.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota Within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. MCCARTHY and MAGGIE MCCARTHY et al., Defendants.

Stipulation as to the Death of Defendant Maggie McCarthy Pending the Action.

738 It is hereby stipulated by and between the above named parties that the defendants, Maggie McCarthy, departed this life on or about September 5, 1903, and thereafter and on December 31, 1904, Patrick B. McCarthy was duly appointed administrator of the estate of said Maggie McCarthy, deceased, in the county court within and for Pennington county.

It is further stipulated that the name of Patrick B. McCarthy, as administrator of the estate of Maggie McCarthy, deceased, may be inserted in the title of this action, and substituted in this action in place of said Maggie McCarthy, deceased.

Dated at Rapid City, So. Dak., this January 11, 1905.

MARTIN & MASON AND
FRED H. WHITFIELD,
Attorneys for Plaintiff.
CHARLES W. BROWN AND
SCHRADER & LEWIS,
Attorneys for the Defendants.

Order of Substitution.

Upon reading and filing the foregoing stipulation of the parties, and being fully advised in the premises,

It is by consent of all parties ordered that Patrick B. McCarthy, as administrator of the estate of Maggie McCarthy, be substituted in said action in place of the late Maggie McCarthy, deceased, as one of the parties defendant therein.

Done and dated at Rapid City, S. Dak., this January 11, 1905.

By the Court.

LEVI McGEE, *Judge.*

Attest:

J. S. GANTZ, *Clerk.* [SEAL.]

EXHIBIT 32.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

vs.

PATRICK B. McCARTHY et al., Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the
739 above parties to this action, by and through their respective attorneys and subscribers hereto, that notice of the time and place of application to the circuit court to modify the judgment in accordance with the directions of the supreme court on appeal, be waived, and said application be presented to the court on this 11th day of January, A. D. 1905, at two o'clock p. m., at this time; all of said parties interested being present at this time and consenting thereto.

Dated at Rapid City, So. Dak. this January 11, A. D. 1905.

MARTIN & MASON AND
FRED H. WHITFIELD,
Attorneys for Plaintiff.
CHARLES W. BROWN AND
SCHRADER & LEWIS.
Attorneys for Defendants.

EXHIBIT 33.

In Supreme Court, State of South Dakota, *ss:*

FIRST NATIONAL BANK OF RAPID CITY, Plaintiff and Respondent,

vs.

PATRICK B. McCARTHY et al., Defendants and Appellants.

I, Frank Crane, clerk of the Supreme Court in and for the State of South Dakota do hereby certify that the foregoing is a true and

correct copy of the order denying petition for rehearing in the above entitled cause, and of the whole thereof, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Pierre, this 20th day of December, A. D. 1904.

FRANK CRANE,
Clerk of the Supreme Court,
By C. LOUIS ALLEN,
Deputy.

[SEAL.]

In Supreme Court, State of South Daktoa, *ss:*

740 Be it remembered that — a term of the supreme court of the State of South Dakota begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1904, on the thirty-fifth day of the term, to-wit: On the 8th day of June, A. D. 1904.

Present Dighton Corson, presiding judge, Howard C. Fuller and Dick Haney, judges of said court, the following proceedings were had and the following judgment was entered, to-wit:

In Supreme Court, State of South Dakota, April Term, A. D. 1904.

File No. 1747.

First National Bank of Rapid City, Plaintiff and Respondent,
vs.
Patrick B. McCarthy et al., Defendants and Appellants.

Present Dighton Corson, presiding judge, Howard C. Fuller and Dick Haney, judges of said court, and the officers thereof.

This action coming on to be heard at the April, A. D. 1902, term of this court, at the supreme court room, in the City of Pierre, State of South Dakota, upon the merits of the case and argued by counsel and the court having advised thereon and filed its decision in writing,

It is considered, ordered and adjudged that the judgment of the circuit court within and for Pennington county, appealed from herein, be and the same is hereby modified as directed in said decision.

And it is further ordered, that this action be and is hereby remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged, that — have and recover of the — costs and disbursements on this appeal expended, taxed and allowed at —

By the Court,

D. CORSON,
Presiding Judge.

[SEAL.]

Attest:
FRANK CRANE, *Clerk.*
By C. LOUIS ALLEN, *Deputy Clerk.*

741 STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, Frank Crane, clerk of the supreme court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the judgment of the supreme court of the State of South Dakota, in the above entitled action, wherein First National Bank of Rapid City is plaintiff and respondent, versus Patrick B. McCarthy, et al., defendants and appellants, as the same now remains of record in said court.

In witness whereof, I hereunto set my hand and affix*ed* the seal of said court, this twentieth day of December, A. D. 1904.

FRANK CRANE, *Clerk,*
By C. LOUIS ALLEN,
[SEAL.] *Deputy Clerk.*

Filed in the circuit court Dec. 27, 1904, at 11 o'clock a. m.
J. S. GANTZ, *Clerk.*

EXHIBIT 34.

In the Supreme Court, State of South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff and Respondent,
vs.
PATRICK B. MCCARTHY, MAGGIE MCCARTHY, et al., Defendants, of Whom Patrick B. McCarthy and Maggie McCarthy are Alone the Appellants.

Order Denying Petition for Rehearing.

The appellants, Patrick B. McCarthy and Maggie McCarthy, having on the 15th day of August, 1904, duly made, served and filed their petition for rehearing herein, and the respondent having on the 8th day of September, 1904, duly made, served and filed its answer thereto, and the court having duly considered the same, it is now here

Ordered

That the petition of the appellants for a rehearing in the above entitled action be and the same is hereby in all things overruled and denied.

Dated at the City of Pierre, in the State of South Dakota,
742 this 30th day of November, A. D. 1904.

D. CORSON,
Presiding Judge.

Attest:
FRANK CRANE, *Clerk,*
[SEAL.] By C. LOUIS ALLEN, *Deputy.*

EXHIBIT No. 35.

"C."—10—1747.

In the Supreme Court, State of South Dakota.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Respondent,

vs.

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, et al., Defendants, of Whom Patrick B. McCarthy and Maggie McCarthy are Alone the Appellants.

Opinion filed June 8th, 1904.

Appeal from Circuit Court Pennington County.

Charles W. Brown, Edmund Smith and I. W. Goodner for Appellants.

Martin & Mason and Fowler & Whitfield for Respondents.

CORSON, *P. J.:*

This is an action for the foreclosure of a mortgage in which usury and certain other defenses were pleaded by the defendants, Patrick and Maggie McCarthy, who alone appealed from a judgment in favor of the plaintiff and from an order denying their application for a new trial.

This being an action in equity triable by the court, its charge in submitting certain issues to a jury; and the conduct of the jury are not subject to review. Assignments of error relating thereto demand no consideration. It was wholly within the discretion of the court what, if any, issues should be submitted; the findings of the jury were merely advisory; upon the court rested the duty and responsibility of determining the facts; and this court must
743 review its decision precisely as it would if no jury had been impaneled.

Apland v. Potts, 16 S. D. 92 N. W. 19.

Admitting the execution of the note and mortgage in suit, appellants contend (1) that such note was a renewal of former notes which were tainted with usury, and that under the law applicable to such a state of facts sufficient payments were shown to substantially extinguish the indebtedness; and (2) that the plaintiff having attempted to procure a tax title to the mortgaged premises and not having paid the taxes assessed thereon for the purpose of protecting its security, according to the terms of the mortgage, the circuit court erred in adding such taxes to the sum found to be due the plaintiff.

The first contention rests on the alleged fact that the note in suit was merely a renewal, its s- consideration being a pre-existing indebtedness. Notwithstanding the rule that findings of a trial court

on disputed questions of fact are always presumptively right and must stand unless the evidence clearly preponderates against them, it is the duty of this court, in cases tried by a court or referee, to review the evidence, whenever the question of its sufficiency is properly presented, for the purpose of ascertaining whether or no there is a clear preponderance against the findings of such court or referee.

Farwell v. Sturgis Water Co. 10 S. D. 421.
William v. Williams 6, S. D. 284.
Randall v. Burk Township 4, S. D. 337.

Regarding the execution of the note in suit, the learned circuit court found as follows: "That said note of July 22, 1891, for the sum of $5,000 executed and delivered by the defendants, Patrick B. McCarthy and Maggie McCarthy, to the plaintiff, the First National Bank of Rapid City, South Dakota, was so made, executed and delivered by said defendants, and was received by said plaintiff as a new and original indebtedness and obligation, and not as a renewal or continuation of any prior existing indebtedness or obligation of the said defendants, Patrick B. McCarthy, or Maggie McCarthy, or either of them, or any other person, firm or corporation." This finding clearly conflicts with conceded facts and a fair and reasonable
744 view of the entire evidence. The record contains a copy of the note. It was for $5,000 payable to the order of the plaintiff six months after date, with interest at 12 per cent per annum, dated July 22, 1891, signed by each of the appellants. The record also contains the copy of a note for $5,000 payable to the order of the plaintiff twelve months after date with interest at 12 per cent per annum, dated May 22, 1889, signed by each of the appellants and one Michael McGuire. Plaintiff's president, who had formerly been its cashier, and who was personally acquainted with nearly all of the numerous transactions disclosed by the evidence testified on cross-examination as follows:

Q. Was the note of July 22, 1891, a renewal of or a substitution of this note of May 22, 1889?

A. I don't so regard it.

Q. Did it represent the same indebtedness so far as McCarthy was concerned?

A. McCarthy was on the note with these parties for that amount.

Q. If McCarthy and Tighe had not signed any of these notes, this note of July 22, 1891, and May 22, 1889, is the same indebtedness of McCarthy?

A. No, sir, it is not the same indebtedness; it is an indebtedness of different parties.

Q. Why do you say it is not the same indebtedness so far as McCarthy is concerned?

A. When two individuals come in there and make a loan and a third party comes in and says we want to get money to take up this loan and want to get the other people off, and we want you to let us have the money to pay off this note and get these other people off, and in this case we did that and let McCarthy have the money to pay off this note and give this security.

Q. When the note of July 22, 1891, was signed by McCarthy and wife, did you pay McCarthy any money, your bank?

A. We placed the amount to his credit: the transaction was this: Mr. McCarthy may have drawn.

Q. What did he do? Did you pay him any money? Did he get a nickel?

A. I don't think the actual cash was handled, but the proceeds of that note were turned to McCarthy's credit, and paid for the other note.

Q. Was any money placed to Mr. McCarthy's credit that day on the books of the bank?

A. I would have to look.

Q. Did he have any account on the books of the bank on that date?

A. I will look. What date?

Q. July 22, 1891?

745 A. It may not have gone through the actual transaction.

Q. It was not in actual money?

A. The transaction was just the same; it was not imaginary money.

Q. State your best recollection, if you have not McCarthy's account here; was any credit given to McCarthy at the bank at the time he and his wife signed the note of July 22, 1891, for $5,000.

A. I don't remember whether the account was credited on the book or not.

Q. At the time the note of May 22, 1899 for $5,000 signed by McCarthy and wife and McGuire, did you pay them any money that day? Did you pay them $5,000 when they signed that note?

A. It is not very likely that we made a transaction in which we turned the money out at one window and in at the other." This witness also stated that the same record was made in the bank when a note was "paid in cash" as when it was "paid by a new." Thus it clearly appears that the indebtedness represented by the note of May 22, 1889, constituted the consideration of the note in suit, such indebtedness, its amount augmented by interest, reduced by payments, remained when the latter evidence thereof was executed.

The transaction of July 22, 1891, did not involve the delivery of any money and we were unable to discover any competent evidence tending to prove that the parties intended the new note to be regarded as a payment of the old one. The transaction was not unusual. It is easily understood. The bank held the past due note of May 22, 1889. To avoid carrying past due paper and improve its security the amount remaining unpaid, according to the bank books, was ascertained and appellants were induced to sign a new note for that amount, securing the same with a mortgage on their homestead, the name of McGuire being omitted from the new note. Nothing more was done, nothing more was intended to be done. The nature of the transaction is to be ascertained from what was said and done by the parties at the time, not from the personal opinions of interested witnesses. The need of accuracy in the use of language and of nice discrimination between facts and conclusions of witnesses,

when dealing with such a transaction, is strikingly illustrated
746 by reference to plaintiff's testimony touching certain subsequently executed notes. On July 1, 1896, appellants executed two notes, one for $5,000 and one for $675.50 the aggregate of these sums being the amount shown by the bank's books to be then due on the note in suit. The president of the bank stated: "At the time this Ex. A. (note in suit) was paid or renewed by Ex. C and Ex. D. (notes of July 1, 1896) Mr. McCarthy was present, but as to whether he figured it up or not I could not say." If the note of July 22, 1891, paid the note of May 22, 1889, then the notes of July 1, 1896 paid the note of July 22, 1891, the indebtedness secured by the mortgage sought to be foreclosed was extinguished and the lien of such mortgage no longer exists, a conclusion the plaintiff would certainly not desire to concede. It seems clear to us that both transactions should be regarded as renewals. They were such in fact. If the note of May 22, 1889, was tainted with usury the note of July 22, 1891, was not purged of such taint, even if the parties at that time intended such result, which does not appear. The promise of the debtor to pay illegal interest however often repeated is not in itself sufficient to avoid the consequences of a usurious contract. As the decision of the learned circuit court cannot stand without the support of the finding heretofore quoted, and such finding is against the clear preponderance of the evidence the judgment appealed from will have to be modified.

It is undisputed that appellant, Patrick B. McCarthy, executed and delivered to the bank on August 22, 1887, four promissory notes for $1,000 each, wherein he promised to pay interest thereon at 18 per cent per annum from date until maturity. At that time the highest lawful rate of interest under the laws of Dakota Territory where such notes were executed, was 12 per cent per annum. Laws 1887, 6207. Hence, such notes were usurious. (U. S. Rev. Stat. secs. 5197, 5198) and if the indebtedness then contracted continued by means of renewal notes down to the execution of the note of May 22, 1889 and constituted the consideration thereof, the note in suit is tainted
with usury, it being, as we have shown, a renewal of the 1889
747 note. If the note in suit is tainted with usury, the amount, if any, of plaintiff's recovery thereon depends on the law of congress relating to usurious contracts of national banks, in the application of which state courts are bound to follow the adjudications of the United States Supreme Court.

Farmers' Bank v. Oliver, 55 Neb. 774, 76; 2. 449.
Robbins v. Mildrow 39 Kan 112, 18 Pac. 64.
National Bank of Auburn v. Lewis, 75 N. W. 516.
Holden v. Crosgrow 12 Gray 216.
Bridge v. Hubbard, 15 Mass. 96.
Steele v. Whipple 21 Wend. 103.
Reed v. Smith, 9 Cowan 647.
Tuthill v. Davis, 20 Johns. 285.
Matthews, Admr. v. Traders' Bank, 27 S. E. 609.
First National Bank v. Plankington, 27 Wis. 177.
Snyder v. Mt. Sterling National Bank, 21 S. W. 1050.

Brown v. Marion National Bank, 169 U. S. 416.
Farmers and Mechanics' Bank v. Hoagland, 7 Fed. 139.
Boyd v. Engelbrecht, 36 E. J. Eq. 612.
Taylor v. Morris, 22 N. J. Eq. 606; 27 A. & E. Ency. Law, 967-8.

The only penalty necessarily attaching to the execution of illegal interest under the banking laws of the United States is the forfeiture of all interest to be paid under the contract. The interest paid, however, may in certain cases be counterclaimed as against the amount due upon the instrument if the action is brought within the time limited by statute, and the statute of limitations applies as well to the defense as to the actions brought to recover for usury exacted. Parson v. Grandy 128 N. C. 438; 38 S. E. 179; Farrell v. Blount, 112 Ga. 711; 38 S. E. 56; First National Bank v. McIntruff, 43 Pac. 839; First National Bank v. Turner, 42 Pac. 936; Walsh v. Meyer, 111 U. S. 31; 28 L. Ed. 338; 4 Sup. Ct. Rep. 260; Brown v. Second National Bank, 72 P. St. 209; Carter v. Moses 39 Ill. 543; Davis v. Converse 35 Vt. 506.

In the case at bar all the payments of interest were clearly barred by the statute of limitations and unless payments were made by the defendants upon the principal and properly applied upon the same such payments cannot inure to the benefit of the defendants in this action.

748 This brings us to a consideration of the second part of the proposition of appellants that the debt was extinguished by reason of these payments.

On the trial the following question among others was submitted to the jury. "Q. No. 3. What amount, if any, of payments was made by the defendants, Patrick B. McCarthy and Maggie McCarthy or either of them, as general payments upon said indebtedness, without any direction as to the application thereof?

A. Not any."

The court in its findings of fact referring to the verdict of the jury, says, "The court hereby approves said verdict and the findings of the jury therein, and adopts the same and hereby embodies the same in these findings of the court as findings of fact number XI."

It will thus be seen that there was a finding of the jury that no money was paid as general payments upon said indebtedness and that this finding is fully and distinctly approved by and made a part of the findings of the court. Unless, therefore, there was a preponderance of the evidence against these findings, they are conclusive upon this court. There was some conflict in the evidence in regard to some of the payments made by McCarthy, but as we understand the evidence McCarthy admitted that a very large number of the alleged payments made were understood by him to be made as interest and not upon the principal.

It clearly appears from Mr. Halley's testimony that no payments made by Mr. McCarthy were made to be applied upon his indebtedness generally except such as were to be applied upon some special note held by the bank not connected with the $4,000 loan.

It further appears from the evidence that there were many transactions between the bank and McCarthy between the years 1886 and 1892 and that numerous small notes were given by McCarthy and subsequently paid by him, but there certainly is no preponderance of evidence in favor of McCarthy's theory that he paid large sums into the bank from time to time to be applied generally upon his indebtedness and considering the fact that he was at all times in arrears with his interest it is not reasonable to suppose that payments made by McCarthy were intended to be applied upon the
749 principal or that Mr. Halley as the cashier of the bank understood that such payments were to be applied thereon, so long as there was overdue interest unpaid.

After a careful review of the evidence upon this question we are unable to say that there is any preponderance of evidence in favor of the defendants as against the findings of the jury and court and the plaintiff is therefore entitled to recover the original loan of $4,000 made in 1887.

It is further contended that the plaintiff having attempted to procure a tax title to the mortgaged premises and having paid taxes assessed thereon for the purpose of protecting its security according to the terms of the mortgage the circuit court erred in adding such tax to the sum found to be due the plaintiff.

The mortgage in suit was in the usual form of a mortgage deed, and contained the usual clause with reference to the payment of taxes upon the mortgaged premises, providing among other things that the mortgagors should pay said taxes before the same became delinquent, and if they neglected so to do, the mortgagee might pay the same and add the amount of such payment to the mortgage debt, and said mortgage should stand as security for the repayment thereof, with interest at the rate of 12 per cent per annum until paid. Concerning the taxes the court made the following finding:

"That the defendants, Patrick B. McCarthy and Maggie McCarthy, further failed to comply with the terms of said promissory notes dated February 17, 1896, and of said mortgage, by failing and neglecting to pay the taxes legally assessed upon said mortgaged premises for the years 1890 to 1899 both inclusive; and that heretofore and on March 23, 1898, the plaintiff paid the taxes so assessed and delinquent and unpaid upon said premises for the purpose of protecting its mortgage security therein for the year 1890, in the sum of $175.20; for the year 1891, in the sum of $199.20; for the year 1892, in the sum of $203.11; for the year 1893, in the sum of $157.01; for the year 1894, in the sum of $141.71; for the year 1895, in the sum of $133.47; for the year 1896, in the sum of
750 $151.13; and for the year 1897, in the sum of $142.18; and that on May 23, 1898, the plaintiff also paid the taxes on said mortgaged premises for the purpose of protecting its mortgaged security therein, in the sum of $99.73 for the year 1898; and on February 16, 1900, in the sum of $43.64 for the first half of the taxes thereon for the year 1899, and on September 19, 1900 plaintiff likewise paid $43.63 for the last half of the taxes on said mortgaged

premises for the year 1899, all of which payments were made for the purpose of protecting the plaintiff's mortgage security."

As we understand the record, it was conclusively shown that the payment by the plaintiff on March 23, 1898, referred to in this finding, was, in fact, a purchase by the plaintiff of certain tax certificates held by the county, upon which a tax deed to the mortgaged premises was procured by the plaintiff on June 11, 1898; that on June 30, 1898, the plaintiff commenced an action in the nature of ejectment to recover possession of the premises, alleging that it was seized thereof in fee; that the appellants, defendants in that action, appeared and answered; and that on October 4, 1900, the plaintiff without notice, procured an order dismissing such motion without prejudice. It was further conclusively shown that on former trial of present action judgment was rendered in favor of the plaintiff on May 4, 1897; that on June 19, 1897, the mortgaged premises were sold on execution issued upon such judgment, and purchased by the plaintiff; that an order granting a new trial was affirmed by this court on July 11, 1900, (Bank v. McCarthy, 13 S. D. 356,) and that after the remittitur was sent down the plaintiff served a supplemental complaint wherein it alleged the payment of these taxes for the purpose of protecting its security under the terms of the mortgage. As the bank paid no taxes prior to the commencement of this action and caused a tax deed to issue, it certainly had no intention of acting under the clause of the mortgage, relating to taxes, until after a new trial was ordered and affirmed on appeal as heretofore stated. Its evident purpose was to secure title to and possession of the mortgaged premises as speedily as possible. But that is not material.

751 The question is not what motives prompted the plaintiff's conduct, but what was the legal effect of such conduct on the rights of the parties. While the authorities are conflicting upon the subject, we believe the rule should be, in this state, where the mortgagee has merely a lien on the mortgaged property, that so long as the relation of mortgagor and mortgagee exists the latter cannot as against the former, acquire title to the property by means of a tax sale, where, under the terms of the mortgage, he is permitted to pay the taxes assessed against the land and add the amount so paid to his claim.

Finleyson v. Peterson, 11 N. D. 45. This conclusion is in harmony with the principles announced by this court in Safe Deposit and Trust Co. v. Wickhem, 9 S. D. 341; Id. 9, S. D. 515; under the rule we have stated, in an action by the plaintiff against the appellants for possession of the property, founded on its tax title it would be conclusively presumed that its disbursements on account of taxes were made to redeem and protect the property. No reason exists why the same presumption should not prevail in this action. It was appellant's duty to pay the taxes when due. The plaintiff had the option to pay at any time after they became delinquent or not at all. The additional burden resulting from delay, in interest, penalties and costs, must be borne by the appellants if they retain the property. Of course the plaintiff cannot charge the appellants with sums not actually and necessarily expended. As the tax deed was

inoperative as to the appellants the costs of its procurement and recording should not be allowed to the plaintiff. While the plaintiff was not required to take care of the taxes before it did; while it cannot be held responsible for interest penalties and costs, resulting from the failure of both parties to pay promptly, it is entitled to recover only such sums as were necessary to protect its security at the time of making its disbursements, and this we understand is all that was allowed by the court below. The attempt by plaintiff to obtain possession of the property by means of the ejectment action, pending the proceedings to foreclose its mortgage, may not have been commendable conduct, but it did appellants no harm beyond the expense of appearing and filing their answer. Such at-
752 tempt certainly did not operate to invalidate the lien of the mortgagee any more than would the commencement and dismissal of an action to obtain possession of mortgaged property where no tax title was involved.

The facts in the case having been fully found by the trial court we do not deem it necessary that another trial be had. It is therefore, ordered that the judgment of the court below be modified by striking therefrom the amount recovered upon the note in excess of $4,000 and that a judgment be entered by the circuit court in favor of the plaintiff for the sum of $4,000 the amount originally loaned by the plaintiff and also for all taxes paid as found by the circuit court, with interest thereon to the date of the judgment and that the mortgaged premises be sold to satisfy the same in the manner provided by law. And the judgment when so modified is affirmed. It is further ordered that as the judgment of the court below is modified neither party will recover of the other any costs on this appeal.

Haney, J. dissenting. The judgment below should be reversed and a new trial ordered.

In Supreme Court, State of South Dakota, ss:

FIRST NATIONAL BANK OF RAPID CITY, Plaintiff and Respondent,
vs.
PATRICK B. MCCARTHY et al., Defendants and Appellants.

I, Frank Crane, clerk of the supreme court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 12 inclusive contain a true and correct copy of the opinion in the above entitled cause, and of the whole thereof, as the same now remains of record in said cause, and of the whole thereof, as the same now remains of record in said supreme court. In witness whereof I have hereunto set my hand and affixed the seal of said court at Pierre this 8th day of July, A. D. 1904.

[SEAL.]

FRANK CRANE,
Clerk of the Supreme Court.
By C. LOUIS ALLEN, *Deputy.*

753 EXHIBIT No. 36.

In the Circuit Court of the Seventh Judicial Circuit of South Dakota within and for Pennington County.

FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Plaintiff,

versus

PATRICK B. MCCARTHY, MAGGIE MCCARTHY, MILTON FREASE, Charles L. Ward, The Hamberger Company, a Corporation; The Mathushek Piano Manufacturing Company, a Corporation; Charles W. Johnson, Trustee; Herbert N. Johnson; Solomon Karpen, Oscar Karpen, and Adolph Karpen, Co-partners as S. Karpen & Brothers; Edward W. Speed, as Administrator of the Estate of William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John J. Fayel; Omaha National Bank, a Corporation, and Pennington County, a Public Corporation of the State of South Dakota, Defendants.

Decree of Judgment and Foreclosure and Sale as Modified and Affirmed by the Supreme Court on Appeal.

This cause having been regularly tried at the March, A. D. 1901 term of the above named court by said court, Hon. Levi McGee, judge thereof presiding, and a jury (certain specific questions of fact having been submitted to said jury for its determination upon the application of the defendants), the plaintiff appearing at said trial by its attorneys, Messrs. Martin & Mason and Fred H. Whitfield, and the defendants, Patrick B. McCarthy and Maggie McCarthy appearing in person and by their attorneys, Charles W. Brown, Esq., and Edmund Smith, Esq., the other defendants not appearing in any manner in said action or at said trial; and the jury having found and returned a verdict and findings in favor of the plaintiff and against the defendants upon all the issues submitted for its determination, said verdict having been filed and entered and the court having approved and adopted the same and having made its decision in writing and a judgment and decree of fore-

754 closure and sale having been duly made and entered herein on May 18, 1901, in Judgment Book 9, at pages 53 et seq., in favor of the plaintiff and against the defendants Patrick B. McCarthy as principal and Maggie McCarthy as surety in the sum of $11,221.30 for damages, interest and costs, and the mortgaged premises therein described being decreed to be sold in the manner provided by law for the satisfaction thereof; that afterwards on May 31, 1901, by an order made herein there was duly set off against said judgment above mentioned, a judgment of the circuit court of South Dakota, in and for Pennington county, in favor of the defendants, Patrick B. McCarthy and Maggie McCarthy, against the plaintiff in the sum of one hundred and sixteen dollars and eighty-five cents. And an appeal having been taken by said defendants to the supreme court of South Dakota from said judgment and decree, whereupon

said supreme court modified said judgment by its decision rendered upon said appeal, and directed as follows:

"It is therefore ordered that the judgment of the court below be modified by striking therefrom the amount recovered upon the note in excess of $4,000.00 and that a judgment be entered by the circuit court in favor of the plaintiff for the sum of $4,000.00, the amount originally loaned by the plaintiff, and also for all taxes paid as found by the circuit court, with interest thereon to the date of the judgment, and that the mortgaged premises be sold to satisfy the same in the manner provided by law. And that the judgment when so modified is affirmed."

The record of said cause on ap-eal together with the remittitur from the supreme court having been returned to this court and filed in the office of the clerk of this court on December 27, 1904. And it having been suggested to this court upon the record that the defendant, Maggie McCarthy, has departed this life during the pendency of this action, viz: on or about September 3, 1903, and Patrick B. McCarthy having been appointed administrator of the estate of said Maggie McCarthy, deceased; and said administrator having been substituted in this action in place of said Maggie Mc-
755 Carthy, deceased, by an order heretofore made and entered herein; and said set-off of $116.85 being a proper set-off against the judgment as modified herein, with interest to this date, amounting in all to $145.60. And this cause coming on at this time upon the application of the plaintiff to have said judgment modified accordingly, time and place of such application having been waived by the written stipulation of the parties, the plaintiff appearing by its attorneys, Messrs. Martin & Mason and Fred M. Whitfield, and the defendants, Patrick B. McCarthy, and Patrick B. McCarthy as administrator of the estate of Maggie McCarthy, deceased, appearing by their attorneys, Charles W. Brown, Esq., and Messrs. Schrader & Lewis, and the court being fully advised in the premises, upon the motion of plaintiff's said attorneys, makes and enters the following modification of said judgment herein, in accordance with the mandate of the supreme court and as the final judgment and decree in this cause, to-wit:

It is ordered and adjudged that the plaintiff, the First National Bank of Rapid City, South Dakota, have and recover of the defendants Patrick B. McCarthy as principal, and Patrick B. McCarthy as administrator of the estate of Maggie McCarthy, deceased, as surety, the sum of Four thousand dollars, the amount originally loaned by the plaintiff, together with the sum of Thirteen hundred fifty-nine dollars for the taxes paid exclusive of the cost of procuring tax deed, with interest on $43.63 thereof from September 19, 1900; on $43.64 thereof from February 16, 1900; on $99.73 thereof from May 26, 1899; and on $1172 thereof from March 23, 1898, all at the rate of seven per cent per annum to this date; and amounting in all for principal, taxes and interest thereon to the sum of Fifty-nine hundred eighty-three dollars and seventy one cents ($5,983.71) besides the costs and disbursements of this action in the trial below taxed at the sum of one hundred thirteen dollars and forty-five cents, and de-

ducting therefrom the set-off in favor of the defendants in the sum of One hundred forty-five dollars and sixty cents ($145.60) making the net amount of this judgment as modified the sum of Five thousand nine hundred fifty-one dollars and fifty-six cents
756 ($5,951.56) in favor of the plaintiff and against the defendants last above named, with interest thereon at seven per cent per annum from this date.

It is further ordered, adjudged and decreed by the court that the mortgaged premises described in the complaint in this action, and hereinafter described or so much thereof as may be sufficient to raise the amount so found and adjudged to be due the plaintiff for principal, taxes, interest and costs of this action, and which may be sold separately without material injury to the parties, be sold at public auction at the front door of the Court House in Rapid City, Pennington county, South Dakota, upon the like notice and in the same manner as provided by law for the sale of real property upon execution, by or under the direction of the sheriff of said Pennington county. That said sheriff give public notice of the time and place of such sale by the publication for thirty days, at least once each week immediately preceding said sale, in some newspaper published and of general circulation in said county. That the plaintiff or any other party to this action may become a purchaser at such sale. That the sheriff execute and deliver to the purchaser a certificate of said sale, and upon the confirmation of the report thereof and the expiration of the time allowed by law for the redemption of said premises, if the same are not then redeemed, said sheriff or his successor in office make to the holder of said certificate a deed of the premises sold. That out of the proceeds of such sale, after deducting the amount of his fees and expenses, the sheriff pay to the plaintiff or its said attorneys, the sum of Five thousand nine hundred fifty-one dollars and fifty-six cents, with interest from this date at seven per cent per annum and the cost of said sale, or so much thereof as the proceeds thereof will pay of the same, and that he take a receipt of the plaintiff or its attorneys for the amount so paid and file the same with his report of sale. That the sheriff pay the surplus moneys arising from said sale, if any, to the clerk of this court and that he make a report of such sale and of his doings in the premises, and file the same with the clerk of this court with all convenient
757 speed. That the purchaser at such sale be let into possession of the premises upon the production of the sheriff's deed therefor.

And it is further ordered, adjudged and decreed by the court, that if the proceeds of such sale are insufficient to pay the amount so found and adjudged to be due as aforesaid, with interest and cost of sale, the sheriff shall specify the amount of such deficiency in his report of sale, and the defendant Patrick B. McCarthy as principal and Patrick B. McCarthy as administrator of the estate of Maggie McCarthy, deceased, as surety, pay the same with interest from the day of sale; and that execution issue therefor.

And it is further ordered, adjudged and decreed by the court, that

the defendants, and all persons claiming under them or either of them since the commencement of this action and after the filing of the complaint herein, be forever barred and foreclosed of all right, title, interest and equity of redemption in and to said mortgaged premises, unless the same shall be redeemed within the time and in the manner prescribed by law for such redemption.

The following is a particular description of the mortgaged premises to be sold as hereinbefore directed, to-wit: Lots numbered fifteen (15) and sixteen (16) in Block numbered eighty-five (85) of the original townsite of Rapid City, in Pennington county, South Dakota, as shown by the official plat thereof on file in the office of the Register of Deeds of Pennington county, South Dakota, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Done in open Court at Rapid City, South Dakota, this eleventh day of January, A. D. 1905.

By the Court.

LEVI McGEE, *Judge.*

Attest:

[SEAL.] J. S. GANTZ, *Clerk.*

Execution on the within and foregoing judgment is stayed for ten days from this date. Dated at Rapid City, this 12th day of January, 1905. Levi McGee, Judge. Filed Jan'y 12, 1905, at 4 o'clock p. m. J. S. Gantz, Clerk. Entered Book 11, page 350. Judgments.

758 PLAINTIFF'S EXHIBIT No. 37.

RAPID CITY, DAK., *Aug.* 22, 1887.

$1000

When due 8–22

Number 8688

Twelve months after date, I or either of us promise to pay to order of First National Bank, of Rapid City, Dakota, One Thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at eighteen per cent. per annum from date until paid, for value received, interest payable semi-annually.

And with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

P. B. McCARTHY.

First National Bank
Paid Jan. 25, 1888
Of Rapid City, Dakota.

PLAINTIFF'S EXHIBIT No. 38.

RAPID CITY, DAK., *Aug.* 22*d*, 1887.

$1000

When due 5–22

Number 8687

Nine months after date, I or either of us promise to pay to the order of First National Bank, of Rapid City, Dak., One Thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at eighteen per cent per annum from date until paid, for value received.

And with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the exemption Law of the Territory of Dakota.

P. B. McCARTHY.

First National Bank
Paid Jan. 25, 1888
Of Rapid City, Dakota.

PLAINTIFF'S EXHIBIT No. 39.

RAPID CITY, DAK., *Aug.* 22*d*, 1887.

$1000

759

When due 2–22

Number 8686

Six months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, One Thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at eighteen per cent per annum from date until paid, for value received.

And with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

P. B. McCARTHY.

First National Bank
Paid Jan. 25, 1888
Of Rapid City, Dakota.

PLAINTIFF'S EXHIBIT No. 40.

RAPID CITY, DAK., *Aug.* 22*nd*, 1887.

$1000

When due 11–20

Ninety days after date I, or either of us, promise to pay to the order of the First National Bank of Rapid City, Dakota, one thousand dollars at First National Bank of Rapid City, Dakota, with interest at eighteen per cent per annum from date until paid for value received.

Number 8685

And with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the exemption law of the Territory of Dakota.

P. B. McCARTHY.

First National Bank
Paid Jan. 25, 1888
Of Rapid City, Dakota.

(Endorsed on back of note.)

Nov. 30 Int. to 11-20, $45.00.

PLAINTIFF'S EXHIBIT No. 41.

RAPID CITY, DAK., *Aug. 7th*, 1888.

$4000.00

When due

Number 760

11245

LL

Ninety days after date, we, or either of us promise to pay to the order of First National Bank of Rapid City, Dakota, Four Thousand Dollars, at First National Bank of Rapid City, Dakota, with interest at eighteen per cent per annum from date until paid for value received. And with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

P. B. McCARTHY & CO.
P. B. McCARTHY.
M. McGUIRE.
D. H. TIGHE.

Across the face of the note is the following: "Cancelled, taken up by P. B. McCarthy."

(Endorsed on back.)

Nov. 9, Ac. Interest $100.00.
Nov. 22, Int. pd. to 11-5 $80.00.
Feb'y 6, Int. pd. to 2-3 $180.00.

PLAINTIFF'S EXHIBIT No. 42.

RAPID CITY, DAK., *May 22nd*, 1889.

Twelve months after date we or either of us promise to pay to the order of First National Bank of Rapid City, Dakota, five thousand dollars at First National Bank of Rapid City, Dak., with interest at twelve per cent per annum from June 22, 1889, until paid, for value received, payable quarterly and with — dollars attorney's fees in addition to other costs in case the holder is obliged to enforce payment

at law. And we further waive all benefits of the exemption law of the Territory of Dakota.

$5,000.00, when due, number 1222, 13850.

PATRICK B. McCARTHY.
MAGGIE McCARTHY.
MICHAEL McGUIRE.

(Endorsements on back.)

P. B. McCarthy & Co.
Nov. 27, Int. pd. 11-22, $250.00.
Mch. 22, Int. pd. 3-22-90, $200.00.
June 5, Int. pd. to 5-22, $100.00.
Sept. 30, Int. paid to Sept. 22, $20.00.
Dec. 23, Int. paid to 12-22-90, $150.00.
Filed March 20, 1901.

WILLIAM P. BAKEN,
Clerk of Courts,
By JOHN P. McELROY, JR., *Deputy.*

761 PLAINTIFF'S EXHIBIT No. 43.

RAPID CITY, SO. DAK., *July* 22, 1891.

Int. $300
$5,000
$5,300
When due
Number
13,850

Six months after date we, or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak., Five Thousand Dollars, at First National Bank of Rapid City, So. Dak., with interest at 12 per cent. per annum from date until paid, for value received.

P. B. McCARTHY.
Post Office: MAGGIE McCARTHY.

(Endorsement on back of note.)

Feby 8th 92, pd ac. int. $76.65. Feby 29th, 92, pd ac int. 45.00. Apl 28th 92 pd ac int. 69.28. Aug 16th 92 pd ac int. by (Hill) 60.00. Aug 18th pd ac int. (Hill) 40.00. Sept 2d 92 pd ac int. (Hill) 35.00. Sept. 10th 92 pd ac int. (Hill) 15. Jany 16th 93, pd on int. 30. Feby 1st 93 pd on int. 50.00. Mch 31st 93 pd on int. 40.00. Mch 13, 93 pd on int. 10.00. Apl 10 93 pd on int. 50.00. May 3d 93 pd on int. 55.00. May 13 93 pd on int. M. Kelley order favor Hill 30.00. May 13 93, pd on ac int. Hill by Challis 25.00. June 6, 93, pd on ac int. 50.00. July 10, 93, pd on ac int. 50.00. July 25, 93, pd on ac int. (Keenan) 25.00. Oct. 5th 93 pd on ac int. 25.00. Nov. 16th 93 pd on ac int. 25.00. Dec. 23, 93, pd on ac int. 20.00. Jany 20, 94, pd on ac int. (Keenan) 84.40. Jany 24, 94 pd on ac int. (Joe Wallace) 63.25. Feby 5th 94 pd on ac int. (Keenan) 40.00. Mch 3d 94 pd on ac int. 40.00. Apl 4-94 pd on ac int (Keenan) 40.00. May 2d 94 pd on ac int. (Keenan) 40.00. June 5th 64 pd on ac int. (Keenan) 19.50. July

11th 94 pd on ac int. (Keenan) 12.25. Sept. 18th 94 by Keenan rent ac int 27.75. Oct. 5, 94, by cash (horse note) ac int. 19.50. Dec. 11, 94 by cash ac int. (Keenan rent) 10.00. Nov. 9th 94 by cash ac int. (Keenan rent) 25.00. Dec. 4, 94 by cash ac int. (Keenan rent) 25.00. Dec. 29, 94 by cash ac int. (Keenan rent) 1.60. Jany 16, 95 by cash ac int. (Tracey & S) 15.00. Feby 11, 95 by cash as int. (Tracey & S) 15.00. Mch 20th 95 by cash ac int. (Keenan) 25.00. Apl 2d 95 by cash ac int. (Keenan) 25.00. May 6, 95 by cash ac int. (Keenan) 25. June 1, 95 by cash ac int. (Keenan) 25.

July — 95 by cash ac int. (Keenan) 25. Aug. 12, 95 by
762 cash ac int. Keenan) 25. Sept 2d 95 by cash ac int. (Keenan) 25. Oct 2d 95 by cash ac int. (Keenan) 25. Nov. 11, 95 by cash ac int. (Keenan) 25. Nov. 30, 95, pd cash int. (Franklin jdgt.) 200.95. Dec. 12th 95 pd cash ac int. (Keenan) 25.00. Jan 2d 96 pd cash ac int. (Keenan) 12.50.

EXHIBIT 44.

This indenture, made this 22nd day of July in the Year of Our Lord One Thousand Eight Hundred and ninety-one, between Patrick B. McCarthy and Maggie McCarthy, his wife, parties of the first part and The First National Bank of Rapid City, So. Dak. party of the second part;

Witnesseth, that said parties of the first part for and in consideration of the sum of Five Thousand Dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey, to the said party of the second part its heirs and assigns, forever, all those tracts or parcels of land, lying and being in the County of Pennington and State of South Dakota, described as follows, to-wit: Lots numbered fifteen (15) and sixteen (16) in block numbered eighty-five (85) of the original townsite of Rapid City, Pennington county, South Dakota, and shown on the official plat of said Rapid City, S. D., on file in the office of the register of deeds of Pennington county, South Dakota.

To have and to Hold the Same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, its successors and assigns, Forever. And the said Patrick B. McCarthy and Maggie McCarthy, parties of the first part do covenant with the said party of the second part, its successors, heirs and assigns, as follows: First, that they are lawfully seized of said premises; Second, that they have good right to convey the same; Third, that the same are free from all incumbrances whatsoever; Fourth, that the said party of the second part, its successors and assigns, shall quietly enjoy and possess the same.

and that the said parties of the first part will warrant and
763 defend the title to the same against all lawful claims.

Provided, Nevertheless, that if the said Patrick B. McCarthy and Maggie McCarthy, his wife, parties of the first part, their heirs, executors or administrators or assigns shall well and truly pay, or cause to be paid to the said party of the second part, heirs, execu-

tors, administrators or assigns, the sum of Five Thousand dollars, and interest according to the conditions of one promissory note; the said note is more particularly described as follows, to-wit: "Rapid City, South Dakota, July 22, 1891, Six months after date, we or either of us promise to pay to the order of First National Bank of Rapid City, S. Dak. Five Thousand Dollars at First National Bank of Rapid City, South Dakota, with interest at 12 per cent per annum from date until paid for value received, bearing even date herewith, then this deed to be null and void, otherwise to be and remain in full force and effect. But if default shall be made in the payment of said sum of money, or interest, or any part thereof, at the time and in the manner hereinbefore specified for the payment thereof, the said parties of the first part in such case do hereby authorize and fully empower the said party of the second part, its successors, heirs, executors, administrators or assigns, to sell the said hereby granted premises at public auction, and convey the same to the purchaser in fee simple, agreeably to the statute in such case made and provided, and out of the monies arising from such sale to retain the principal and interest which shall then be due on the said promissory note, together with all costs and charges, and also statutory attorney's fees, and pay the overplus, if any, to the said parties of the first part, their heirs, administrators or assigns.

And the said Patrick B. McCarthy and Maggie McCarthy, his wife, do further covenant and agree, to and with the said party of the second part, its successors, heirs, executors, administrators and assigns, to pay the said sum of money specified, at the time and in the manner above mentioned, together with all costs and expenses, if any there shall be, and also in case of the foreclosure of this mortgage, statutory attorney's fees in addition to all sums and costs allowed in that behalf by law, which said sums is hereby acknowledged
764 to be a part of the debt hereby secured and which shall be assessed and payable as a part of said debt, and that they will pay all taxes and assessments of every nature that may be assessed on said premises, or any part thereof, previous to the day appointed by law for the sale of lands for Town, City, County or other taxes.

In Testimony Whereof, the said parties of the first part have hereunto set their hands and affixed seals the day and year first above written.

Signed, Sealed and Delivered.

P. B. McCARTHY. [SEAL.]
MAGGIE McCARTHY. [SEAL.]

In the Presence of

——— ———,
——— ———,
Witnesses.

(Endorsed as Follows:)

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

On this 24th day of July in the year 1891, before me personally appeared Patrick B. McCarthy and Maggie McCarthy, known to me to be the persons who — described in, and who executed the within instrument, and acknowledged to me that they executed the same.

Given under my hand and — seal, the day and year last above written.

[SEAL.] H. W. SOMERS,
Notary Public.

Mortgage deed, No. 11106. P. B. McCarthy, et ux., to First National Bank of Rapid City.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

I hereby certify that this instrument was filed for record in my office at 3:30 o'clock p. m., on the 10th day of October, 1891, and is duly recorded in Book 17, of — page 14.

LYMAN LAMB,
Register of Deeds.
By —— ——, *Deputy.*

Fees, $1.75.

765 Filed Mch. 20, 1901. William P. Baken, Clerk of Courts. By John P. McElroy, Jr., Deputy.

PLAINTIFF'S EX. 44. COPY MORTGAGE DEED.

PLAINTIFF'S EXHIBIT NO. 45.

RAPID CITY, SO. DAK., *Feb'y* 17, 1896.

Four months after date we or either of us promise to pay to the order of the First National Bank of Rapid City, So. Dak., five thousand dollars at First National Bank of Rapid City, So. Dak., with interest at 12 per cent per annum from date until paid for value received.

$5,000
When due
6-17
Number
24245

PATRICK B. McCARTHY.
MRS. MAGGIE McCARTHY.

Post office:

(On the back of exhibit C is the following:) July 1st, 1895, paid on interest (Smith & Brown) $30.00; November 23, 1896, paid on interest $50.00.

Filed March 20, 1901.

WILLIAM P. BAKEN,
Clerk of Court,
By JOHN P. McELROY, JR., *Deputy.*

PLAINTIFF'S EXHIBIT No. 46.

RAPID CITY, So. DAK., *Feb'y* 17, 1896.

Thirty days after we or either of us promise to pay to the order of First National Bank of Rapid City, So. Dak., six hundred seventy-five and 50-100 dollars at First National Bank of Rapid City, So. Dak., with interest at 12 per cent per annum from date until paid for value received. $675.50 When due Number Interest on 13850

PATRICK B. McCARTHY.
MRS. MAGGIE McCARTHY.

Post office:

PLAINTIFF'S EXHIBIT No. 47.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Order $ .60
Copies .25
Mileage .10
766
Total fees .95

I, Charles Canfield, Sheriff of Pennington county, S. D. do hereby certify and return that the annexed notice of demand came into my hands for service on the 25th day of January, A. D. 1905, that I served the same on First National Bank, defendant personally by delivering to and leaving a true copy thereof with James Halley, president of the First National Bank at 3:15 p. m., banking hours at Rapid City, in Pennington County, State of South Dakota on the 25th day of January, A. D. 1905.

CHARLES CANFIELD, *Sheriff.*

PLAINTIFF'S EXHIBIT No. 47*a*.

RAPID CITY, S. D., *Jan.* 25, 1905.

To the First National Bank of Rapid City, S. D.:

You having charged and received from me the sum of $3,802.74 as and for usurious interest on that certain loan of $4,000.00 evidenced by my four promissory notes to you, of that date, each for $1,000.00 and bearing interest from said date at eighteen per cent per annum, and the subsequent renewals thereof; and the principal of said indebtedness having been reduced to final judgment in the circuit court of Pennington County, S. D., on the 12th day of January, 1905, and the said judgment having been paid by me in full on the 21st day of January, 1905, I now demand of you the immediate payment of a penalty of twice the said sum of $3,802.74, to-wit: the sum of $7,605.48 under and by virtue of the provisions of Section 5198 of the Revised Statutes of the United States.

Dated at Rapid City, S. D., this January 25, 1905.

PATRICK B. McCARTHY.

PLAINTIFF'S EXHIBIT No. 48.

No. 49.

PENNINGTON COUNTY BANK,
RAPID CITY, S. D., *Jan'y 21st,* 1905.

Pay to the order of Jacob S. Gantz Clerk of Courts $5,961.91 Five thousand nine hundred and sixty one 91-100 Dollars.

P. B. McCARTHY.

(On the Margin of said check is the following:)
"International Hotel. P. B. McCarthy, Proprietor." Endorsed on the back of said check is the following.
"For the credit of Jacob S. Gantz, Clerk of Courts."
(Stamped on face as follows:)

"Pennington County Bank,
Paid.
Jan. 21, 1905,
767 Rapid City, So. Dak.,"
and "Good
When Properly Endorsed.
$5,961.91.
Geo. F. Schneider, Cashier.

DEFENDANT'S EX. "A."

No. —.

RAPID CITY, — DAK., *Dec.* 23, 189–.

First National Bank $150.00.

Pay to First National Bank or Bearer, One Hundred & fifty Dollars.

P. B. McCARTHY & CO.

Nat. Bk. No. 13850.
John Morris Company, Printers, Chicago.

First National Bank of Rapid City, — Dakota.
Paid
Dec. 23, 1890.

DEFENDANT'S EX. B.

No. 295. RAPID CITY, SO. DAK., *Sept. 30th*, 1890.

Pay to the order of the First National Bank.—$200.00.
The First National Bank of Rapid City. Two Hundred Dollars.

P. B. McCARTHY & CO.,
By McCARTHY.

Int. Bk. 13850.
Lith. John Morris Company, Chicago.

First National Bank of Rapid City, — Dakota.
Paid
Sep. 30, 1890.

PATRICK B. McCARTHY, Plaintiff,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Respondent.

Judge's Certificate to the Foregoing Statement of the Case.

The foregoing statement of the case in the above entitled action having been duly proposed and served within the time allowed by law, and the defendant's time in which to serve proposed amendments to plaintiff's proposed statement of the case having been duly extended by stipulation of the parties until the 15th day of October, 1905; and sundry amendments to said proposed statement having been proposed and served; and the settlement of said proposed
768 statement of the case and proposed amendments thereto coming on regularly for hearing this day before the undersigned, the judge of said court who heard and tried said action, Mr. Charles W. Brown and Messrs. Schrader & Lewis appearing as attorneys for said plaintiff, and Mr. Fred H. Whitfield and Messrs. Buell & Gardner appearing as attorneys for said defendants; and I having rejected certain of the said proposed amendments and having allowed certain of the said proposed amendments, and the said proposed amendments as allowed by me having been duly incorporated in said statement of the case as above set out; and I being fully advised in the premises, and being satisfied that the said statement of the case as here and now presented (with the corrections and amendments incorporated therein as aforesaid) is a full, true, correct, perfect and complete statement of the case containing all the testimony and evidence introduced or offered on the trial of said action, and containing also all the various orders, rulings, instructions to the jury, proceedings and decisions of the court, with the objections and exceptions thereto; the said statement of the case is hereby allowed, signed and sealed and made a part of the record and judgment roll in said action.

Dated at Rapid City, South Dakota, this 16th day of October, A. D. 1905.

By the Court,

LEVI McGEE,
Judge of said Court.

Attest:
[SEAL.] J. S. GANTZ, *Clerk.*

On the 28th day of June, 1905, the following judgment was entered:

Judgment for Plaintiff on Trial.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

This action having been tried by the court and jury at a term of the circuit court held at the court house in Rapid City in said county, on the 31st day of March, A. D. 1905, before the Hon. Levi McGee and the jury having returned a verdict for said defendant and
769 against said plaintiff therein, upon the merits on all the issues and said verdict having been entered in the minutes of said court;

Now, on motion of Buell & Gardner and Fred Whitfield, defendant's attorneys, it is considered and adjudged by the court that said defendant have judgment against the plaintiff on all the issues, upon the merits and that the complaint and this action be and the same are dismissed upon the merits and that the defendant recover of the plaintiff its costs and disbursements, amounting to the sum of — to be taxed and inserted herein by the clerk of this court.

Done in open court, this 27th day of June, 1905.

LEVI McGEE, *Judge.*

Attest:
J. S. GANTZ, *Clerk.*

Motion for a New Trial.

On the 2d day of December, 1905, and within the time allowed by law, the said plaintiff duly moved the court to vacate and set aside the said verdict and the said judgment entered thereon and to grant a new trial of this action, upon the following grounds, to-wit: Upon the same grounds and for the same causes as are set out and specified in the assignment of error at the close of this abstract, and also in the specification of errors appended to and made a part of said Statement of the Case as aforesaid.

Order Denying Motion for New Trial.

On the 2d day of December, 1905, the court made the following rulings upon the said motion and filed and entered the following order:

Now on this day coming on regularly to be heard pursuant to notice duly served, the motion of the above named plaintiff to vacate and set aside the verdict herein and the judgment entered thereon, and to grant a new trial of this action; Mr. Charles W. Brown and Messrs. Schrader & Lewis., plaintiff's attorneys, appearing in support of said motion, and Messrs. Buell & Gardner, defendant's attorneys, appearing in opposition thereto, and the court being fully advised in the premises:—

It is considered and ordered that the said motion be and the same hereby is in all things overruled and denied.

770 Done in open court at Rapid City in said county this 2d day of December, A. D. 1905.

By the Court:

LEVI McGEE, *Judge.*

Attest:

[SEAL.] J. S. GANTZ, *Clerk.*

To which said order and ruling the plaintiff at the time duly excepted and at his request this exception is signed and allowed by the court:

By the Court:

LEVI McGEE, *Judge.*

Attest:

J. S. GANTZ, *Clerk.*

The judgment roll in this action was made up and filed on the 28th day of June, 1905.

Appeal Perfected.

On the 23d day of December, A. D. 1905, and within the time provided by law the said plaintiff and appellant, Patrick B. McCarthy, duly perfected an appeal to the supreme court of the State of South Dakota from the said judgment, dated June 27, 1905, and filed and entered as aforesaid June 28, 1905, in favor of the said defendant and against the said plaintiff, and from the said order denying the plaintiff's motion for a new trial, and from the whole and every part of said judgment and order, by duly serving and filing a supersedeas undertaking in due form as provided by law and by duly serving upon defendant's attorneys and upon the clerk of said circuit court a notice of appeal in due form, specifying that the said judgment and order and the whole thereof were appealed from, and that upon the said appeal the said plaintiff and appellant will insist upon a review and reversal, by said supreme court, of the whole and every part of said judgment and order, and of the verdict and decision upon which said judgment was rendered and entered; said undertaking upon appeal being conditioned as provided by law, and having also been duly served upon defendant's attorneys and the clerk of said circuit court.

Thereafter the clerk of said circuit court duly made his certificate to the judgment roll and original papers in said action and transmitted the same, with his certificate thereto attached, to the supreme court pursuant to said appeal.

771 *Assignment of Error.*

And the appellant herein says there is manifest error on the face of the record in this:

I.

The evidence is insufficient to justify the verdict of the jury and the judgment rendered thereon, and said verdict and judgment and each of them are against law in the following particulars:

1. It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action, and that the same is not barred by the provisions of Section 5198 of the Revised Statutes of the United States, or by any other statute of limitaions.

2. There is no evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action, or that the same is barred by Section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

3. There is no evidence to support the said direction of the court to the jury to return a verdict herein in favor of the defendant and against the plaintiff upon all the issues, and the said direction and instruction of the court is contrary to the evidence and is contrary to law, and contrary to the provisions of said Section 5198 of the Revised Statutes of the United States.

4. It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and
772 against the plaintiff on the 21st day of January, 1905, and not before; that the total payments at any time made by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint, did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in August, 1887; that the plaintiff's cause of action to recover the penalty under the provisions of said Section 5198 of the Revised Statutes of the United States did not accrue until the 12th day of January, 1905, and was therefore not barred by the said provisions of said Section 5198, this action having been duly commenced on the 25th day of January, A. D. 1905.

5. It clearly appears from the evidence, that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the plaintiff paid to the defendant and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged, and the verdict should have been for the plaintiff and against the defendant for the amount claimed in the complaint.

6. For all of the reasons hereinbefore specified the court erred in withdrawing the case from the jury and ordering and directing a

verdict in favor of the defendant and against the plaintiff upon all the issues, and the said charge and ruling of the court is contrary to the evidence and contrary to law and is not sustained by the evidence herein, and the evidence herein was and is insufficient to justify the said direction of a verdict.

773 II.

The court erred in making and entering its order of date February 17, 1905, striking out the sixth paragraph of the complaint herein as irrelevant and redundant, for the reasons, that the allegations of said sixth paragraph of the complaint are material to this controversy, and are properly a part of the issues in this action, and that the plaintiff was entitled to allege and prove as a part of his case the payment and satisfaction of the judgment in said sixth paragraph referred to as well as the date and amount thereof, and said allegations are competent and relevant and material to the issues in this action; that the allegations of said sixth paragraph are necessary for the full and complete presentation and maintenance of plaintiff's case and the evidence in support thereof; that this action is brought to recover a statutory penalty under Sections 5197 and 5198 of the Revised Statutes of the United States; that the final judgment in the action mentioned and referred to in the fifth paragraph of the complaint was filed and entered on the 12th day of January, 1905, and not before; that the total payments of both principal and interest on the original loan mentioned in said fifth paragraph of the complaint, did not equal the sum of four thousand dollars, the amount of said original loan; that it is necessary for the plaintiff to show the entry of final judgment upon the said indebtedness and the payment and satisfaction thereof as a condition precedent to the commencement and maintenance of this action; that Section 5198 of the Revised Statutes of the United States prescribed the penalty sued for in this action and controls all questions in regard to the recovery thereof; that the ruling of the court in striking out said sixth paragraph of the complaint is contrary to the laws of the state,
774 and the statutes of the United States, and particularly to said Section 5198; that for the reasons aforesaid the plaintiff was entitled to allege and prove as a part of his main case, the full payment and satisfaction of the said judgment; that the plaintiff was not entitled to maintain this action without alleging and showing the payment of a sum equal at least to the principal of the loan originally made to him by the defendant, and that plaintiff's cause of action for the recovery of a penalty under said Section 5198, would not be complete and could not accrue without an allegation and proof that the plaintiff had before this action paid to the defendant an amount exceeding said original loan.

III.

For all the reasons hereinbefore specified and assigned the court erred in sustaining the objections of the defendant to the following question propounded to the witness, Jacob S. Gantz, upon his direct examination, to-wit:

"Q. You may state to the court and jury the record you have there with reference to this judgment, judgment found on page 185 of judgment book of circuit court, Pennington county, South Dakota, book 4?"

And in sustaining the motion of the defendant to strike out the following answer thereto, to-wit:

"A. Patrick B. McCarthy, et al., judgment debtor; First National Bank of Rapid City; South Dakota, judgment creditor; amount of judgment, damages and costs, $5,951.56; date of judgment, January 12, 1905; when filed, January 12, 1905, at nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; judgment book No. 11, page 350; name of court, circuit; attorneys of judgment creditor, Fred H. Whitfield; satisfaction of judgment record No. 2, page 11;
775 fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of court."

For all of the reasons hereinbefore specified and for the further reasons that whether or not it was necessary for the plaintiff to allege in his complaint the payment and satisfaction of said judgment, it was necessary and proper for him to prove said payment and satisfaction; that as appears by the undisputed evidence herein, the amount of the loan originally made by the defendant to the plaintiff was four thousand dollars and no more; that the total payments of both principal and interest made by the plaintiff to the defendant before the date of said judgment was less than the amount of said original loan and that no cause of action to recover a penalty under Section 5198 of the Revised Statutes of the United States would be complete or could accrue without proof that the plaintiff had before the commencement thereof paid to the defendant an amount exceeding the amount of said original loan. That said objections made by the defendant to said question are as follows:

"The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court and objects to the payment or the satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out.

"The defendant objects for the reasons that the entry is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to
776 any of the issues framed by the pleadings."

Which question, answer, objections, motion, ruling and exceptions appear on pages 28 and 29 of this abstract.

IV.

For all of the reasons hereinbefore specified and assigned the court erred in sustaining the objections of the defendant to the following question propounded to the witness Gantz upon his direct examination, to-wit:

"Q. As clerk of courts, I will ask you if on the 21st day of

January, 1905, you were not paid as clerk of this court $5,961.91 in satisfaction of this judgment, in full of the judgment, interest and costs to that date?"

Said objection being as follows:

"The defendant objects as calling for a conclusion of the witness, impertinent, and for all of the reasons offered to the same evidence.—counsel knowing from the ruling of the court that it is inadmissible."

Which question, objections, ruling and exception appear on pages 29 and 30 of this abstract.

V.

For all of the reasons hereinbefore specified and assigned, the court erred in sustaining the objections of the defendant to the following question propounded to the witness Gantz upon his direct examination, to-wit:

"Q. Mr. Gantz, I notice that in judgment docket four of Pennington county on page 185, and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head 'satisfaction, remarks, etc.' page 185, you have
777 just entered 'fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of court;' I will ask you whether or not you paid that money to the plaintiff?"

To which question the defendant objected as cumulative and calling for a conclusion of the witness, and as assuming a fact not in evidence, and as incompetent, irrelevant and immaterial for all of the reasons stated in the former objection to the offer of proof relative to the payment of this or any other judgment.

Which question, objections, ruling and exception appear on page 31 of this abstract.

VI.

For all of the reasons hereinbefore specified and assigned, the court erred in sustaining the objections of the defendant to plaintiff's offer in evidence of all of that part of page 185 of judgment docket No. 4 of said circuit court relating to said judgment of the First National Bank of Rapid City, South Dakota v. Patrick B. McCarthy, et al., as it there appears of record,—said objections to said record and judgment docket being made upon the ground that the same is cumulative and for all of the reasons above noted to that class of testimony; and which officer, objections, ruling and exception appear on pages 31 and 32 of this abstract.

VII.

For all of the reasons hereinbefore specified and assigned the court erred in sustaining the motion of the defendant to strike out that portion of the demand, Ex. 47*a*, which refers to the payment of the said judgment obtained by the defendant against the plaintiff; for which motion no grounds or reason was assigned, and which motion, ruling and exception appear on page 59 of this abstract.

778

VIII.

For all of the reasons hereinbefore specified and assigned, the court erred in sustaining the objections of the defendant to the plaintiff's offer in evidence of Ex. 48, being a certified check for $5,961.91, made and delivered by the plaintiff to Jacob S. Gantz, clerk of courts, January 21, 1905, in full payment and satisfaction of said judgment;—the defendant objecting to said offer as a self serving declaration and incompetent, immaterial and irrelevant to prove or disprove any of the issues in this case, it being a check, endeavoring to prove a payment which is not pleaded.

Which offer, objections, ruling and exceptions appear on page 60 of this abstract.

IX.

For all of the reasons hereinbefore specified and assigned the court erred in refusing to give to the jury instruction No. 1 requested by the plaintiff,—which instruction, refusal and exception appear on pages 61 and 62 of this abstract.

X.

For all of the reasons hereinbefore specified and assigned the court erred in refusing to give to the jury instruction No. 2, requested by the plaintiff,—which instruction, refusal and exception appear on pages 62 and 63 of this abstract.

XI.

For all of the reasons hereinbefore specified and assigned the court erred in refusing to give to the jury instruction No. 3, requested by the plaintiff,—which instruction, refusal and exception appear on pages 63 and 64 of this abstract.

XII.

For all the reasons hereinbefore specified and assigned the court erred in sustaining the motion of the defendant to direct the
779 jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and in instructing and directing the jury to return such verdict, and in withdrawing said case from the jury and ordering a verdict for the defendant herein, and said charge and ruling of the court is contrary to the evidence and contrary to law and is not sustained by the evidence for all of the reasons hereinbefore specified;—which motion, direction, instruction and exception appear on pages 64, 65 and 66 of this abstract.

XIII.

For all of the reasons hereinbefore specified and assigned the verdict of the jury and the judgment of the court are erroneous and contrary to law and contrary to the evidence and are not sustained by the evidence, and should be vacated and set aside.

XIV.

For all the reasons hereinbefore specified and assigned, the court erred in overruling and denying the plaintiff's said motion for a new trial.

Wherefore, the plaintiff and appellant prays, that the said judgment of the court below be reversed, and that a new trial of this action be granted for the manifest errors and reasons aforesaid, and for such other and further relief in the premises as may be just and proper.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Attorneys for Appellant.

Rapid City, March 31, 1906.

780 And afterwards, to-wit, on the ninth day of November, A. D., 1906 Brief of appellant was filed in the above entitled cause, which said Brief is in words and figures, as follows, to-wit:

781 STATE OF SOUTH DAKOTA:

In the Supreme Court, October Term, 1906.

PATRICK B. McCARTHY, Plaintiff and Appellant,

vs.

THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Appeal from Pennington County Circuit Court.

Appellant's Brief.

Charles W. Brown, Schrader & Lewis, Attorneys for Appellant.

Supreme Court, State of South Dakota.

Filed Nov. 9th, 1906.

FRANK CRANE, *Clerk.*

782 In the Supreme Court of the State of South Dakota, October Term, 1906.

PATRICK B. McCARTHY, Plaintiff and Appellant,

vs.

THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

Appeal from Circuit Court of Pennington County.

Appellant's Brief.

Statement of the Case.

This is an action commenced January 25, 1905, by the appellant against the respondent, a national banking association organized and existing under the laws of the United States, to recover the sum of

$7,605.48, as a penalty under the provisions of Section 5198
783 of the Revised Statutes of the United States, being twice the amount of the usurious interest claimed to have been paid by the plaintiff to the defendant before this action. The complaint is as follows:

The plaintiff complains and alleges:

1. That the defendant is now and was at all the times hereinafter mentioned a national banking association duly organized and existing under the laws of the United States, and particularly, Title LXII of the Revised Statutes of the United States of 1878, relating to national banks, and the Acts Amendatory thereof, as a corporation; and is now, and during all the times and transactions hereinafter mentioned was located and doing business in the City of Rapid City, in the County of Pennington and State of South Dakota.

2. That on August 22, 1887, at Rapid City, Dakota Territory, now State of South Dakota, the plaintiff made and delivered to the defendant his four certain promissory notes in writing, each for one thousand dollars, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, one thousand dollars, three months after said date, one thousand dollars six months after said date, one thousand dollars nine months after said date, and one thousand dollars twelve months after said date, with interest on each of said sums at eighteen per cent per annum from said date until fully paid, the said notes having been so made and given for the sum of four thousand dollars then loaned by the defendant to the plaintiff. That in and by the said notes, and at the time of the making of the loan, it was knowingly, corruptly, and usuriously agreed by and between the plaintiff and
the defendant that the plaintiff should pay and the defendant
784 should take, receive, reserve, and charge on the said loan and notes a rate of interest greater than was then allowed by the laws of Dakota Territory, to-wit: interest at the rate of eighteen per cent per annum. That on the 24th day of January, 1888, at Rapid City, Dakota Territory, now State of South Dakota, at a renewal of said four notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said last named date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named note being also signed and executed by one M. McGuire and D. J. Tighe. That on April 23, 1888, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said last named date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named note being also signed and executed by said McGuire and Tighe. That on August 7, 1888, at

Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said notes above described, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, four thousand dollars, ninety days after said date, with interest thereon at eighteen per cent per annum from said date until fully paid, said last named
785 note being also signed and executed by the said McGuire and Tighe, and by the copartnership firm of P. B. McCarthy and Company, composed of this plaintiff and said McGuire and Tighe. That on May 22, 1889, at Rapid City, Dakota Territory, now State of South Dakota, as a renewal of said notes above described and including the unpaid usurious interest accrued thereon, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, five thousand dollars, twelve months after said date, with interest thereon at twelve per cent per annum from June 22, 1889, until paid, said last named note being also signed and executed by said McGuire, and also by Maggie McCarthy, the then wife of this plaintiff, as a surety thereon, and being also endorsed in blank by said firm of P. B. McCarthy and Company. That thereafter, on July 22, 1891, at Rapid City, South Dakota, as a renewal of said notes above described, including $1,000 of unpaid usurious interest thereon, the plaintiff made and delivered to the defendant his certain promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, five thousand dollars, six months after said date, with interest thereon at twelve per cent per annum from said date until fully paid, said note being also executed by said Maggie McCarthy as surety; and that to secure the payment of the principal and interest mentioned in said last named note this plaintiff and Maggie McCarthy, his wife, did, at the same time and place, execute under their hands and seals, duly acknowledge and deliver to the defendant a certain mortgage bearing even date with said last named note, whereby this plain-
786 tiff and his said wife mortgaged to the defendant in fee certain lands and real estate situate in said Pennington county, and described in the said mortgage as follows, to-wit: Lots numbered fifteen and sixteen, in block numbered eighty-five, of the original townsite of Rapid City, Pennington County, South Dakota, as shown by the official plat of said Rapid City, S. D., on file in the office of the register of deeds of Pennington County, South Dakota, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining. That on July 22, 1891, at Rapid City, South Dakota, the plaintiff made and delivered to the defendant his certain promissory note in writing dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, three hundred and fifty dollars, on August 31, 1891, with interest thereon at twelve per cent per annum from date until paid, said note being also executed by said Maggie McCarthy, as surety for this plaintiff, and the same having been so made and

given for the purpose of evidencing the usurious interest claimed to be due upon the said notes above described. That on February 17, 1896, at Rapid City, South Dakota, as a renewal and further evidence of the indebtedness represented by said notes above described, except said three hundred and fifty dollar note, the plaintiff made and delivered to the defendant his certain two promissory notes in writing, one for $675.50 and the other for five thousand dollars, both dated on that day, and thereby promised to pay to the order of the defendant, at its banking house in said Rapid City, six hundred and seventy-five and 50-100 dollars, thirty days after said date, and five thousand dollars, four months after said date, with interest on
787 each of said sums at twelve per cent per annum from said February 17, 1896, until fully paid. That the sole consideration of each and all of the said notes was the said original loan of four thousand dollars, and the usurious interest accruing thereon, and that each and all of the said notes subsequent to August 22, 1887, were given and made as mere renewals and extensions of or substitutes for the said four original notes of one thousand dollars each of date August 22, 1887, and, together with the said mortgage, constitute one and the same transaction; copies of which said several notes, together with the endorsements thereon, are hereto annexed, marked exhibits A, B, C, D, E, F, G, H, I, J, K and L, and made a part of this complaint. That at the time of the making of the said several five thousand dollar notes, of date, respectively, May 22, 1889, July 22, 1891, and February 17, 1896, the defendant, knowingly, corruptly, and usuriously reserved, charged, and included therein the sum of one thousand dollars of usurious interest upon the said original indebtedness, and that the defendant also on said February 17, 1896, knowingly, corruptly, and usuriously reserved, charged, and included in said note of six hundred and seventy-five and 50-100 dollars, of date February 17, 1896, the further sum of $675.50 as usurious interest upon said original loan and indebtedness.

3. That on the 22d day of August, 1887, the date of said original loan, and at all times subsequent thereto, the rate of interest was fixed by the laws of the Territory of Dakota and State of South Dakota, and the highest or greatest rate of interest fixed or allowed by law in the Territory of Dakota and State of South Dakota, under the statutes in such case made and provided, was twelve per cent
788 per annum, and at the same rate for a shorter time, and that no other or different rate of interest was then fixed, limited, or allowed by the laws of said territory or state for banks of issue organized under the laws of said territory or state.

4. That between August 22, 1887, and January 1, 1897, at the banking house of the defendant in Rapid City in said Pennington county, the plaintiff paid to the defendant as interest upon the said indebtedness represented by said original loan and evidenced by said several promissory notes, sundry sums of money aggregating $3,802.74, and the defendant knowingly, wilfully, and corruptly demanded and received the same from the plaintiff as usurious interest, and knowingly, wilfully, and corruptly applied the same to the payment of the said corrupt and usurious interest, and endorsed the same on the said several promissory notes as interest received thereon,

knowing the said interest so contracted for and demanded and retained as aforesaid, to-wit: interest at the rate of eighteen per cent per annum, to be a greater rate of interest than was allowed as aforesaid by the laws of said territory and state, and that the defendant did then and there knowingly, corruptly, and usuriously receive and demand said several sums of money (including the said interest note of three hundred and fifty dollars), aggregating as aforesaid, the sum of $3,802.74, as and for payments of the interest which it so demanded and received on the said original indebtedness and on the said several promissory notes as aforesaid, and since has knowingly, wilfully, and usuriously applied and so made use of the said sum of $3,802.74 against the statute of the United States in such case made and provided, to-wit: Sections 5197 and 5198 of the Revised Statutes of the United States and the Acts amendatory thereof.

789 5. That thereafter, to-wit: on the 26th day of January, 1897, the defendant commenced an action in the above entitled court against this plaintiff, said Maggie McCarthy and others, for the foreclosure of said mortgage and for the recovery of the amount due, by their terms, upon the said mortgage and the said note for five thousand dollars of date July 22, 1891, and the said two notes of date February 17, 1896, in which said action this plaintiff, one of the defendants therein, appeared and answered setting up and alleging the foregoing facts with respect to the usurious nature of said original indebtedness and the said mortgage and the said several promissory notes, and praying that the said mortgage and the said notes of date, respectively, July 22, 1891, and February 17, 1896, be adjudged to be usurious, and be purged of the usury therein, and for other general and equitable relief. That thereafter such proceedings were had in said action that on the 18th day of May, 1901, judgment was entered in said court in favor of the said First National Bank and against this plaintiff and said Maggie McCarthy, defendants therein, whereby it was by said court considered, ordered, and adjudged that no part of the said mortgage or notes or indebtedness was unlawful or should be forfeited, or was tainted or affected with usury, and that the said First National Bank recover of this plaintiff, as principal debtor, and said Maggie McCarthy, as surety, the sum of five thousand six hundred and seventy-five and 50-100 dollars principal, with interest thereon from April 1, 1896, at the rate of twelve per cent per annum, also the sum of fourteen hundred and twenty-one and 50-100 dollars on account of taxes paid by said First National Bank

790 upon said mortgaged premises, less $62.50, being the excess paid above what said taxes could actually have been paid and discharged for, with interest on $43.63 thereof from September 19, 1900; on $43.64 thereof from February 16, 1900; on $99.73 thereof from May 26, 1899; and on $1,234.50 thereof from March 23, 1898, all at the rate of twelve per cent per annum, and amounting on said May 18, 1901, for said principal and interest thereon, and for taxes and interest thereon, to the total sum of eleven thousand one hundred and seven and 87-100 dollars as damages on account of said mortgage indebtedness mentioned in the complaint in that action, together with the costs taxed and allowed at the sum of $113.45, and amounting in

all for said principal, interest, taxes, and costs to the total sum of eleven thousand two hundred and twenty-one and 30-100 dollars, and whereby it was by said court further ordered, adjudged and decreed that the said mortgaged premises be sold in the manner provided by law to pay and satisfy the said total amount so found and adjudged to be due to said First National Bank, plaintiff therein, from this plaintiff and said Maggie McCarthy, defendants therein, for principal, interest, taxes paid and interest thereon, and costs, and that the defendants in that action, and all persons claiming under them subsequently to the commencement thereof, be forever barred and foreclosed of all right, title, and interest and equity of redemption in and to the said mortgaged premises so directed to be sold, or any part thereof, unless the same should be duly redeemed within the time allowed by law. That thereafter, and within the time allowed by law, this plaintiff and the said Maggie McCarthy duly moved the court in said action to vacate and set aside its said decision and the said judgment entered therein, and to grant
791 a new trial of said action, which motion was by said circuit court overruled and denied on the 14th day of December, 1901. That thereafter, to-wit: on the 21st day of December, 1901, and before this action, this plaintiff and the said Maggie McCarthy, defendants in that action, duly perfected an appeal to the supreme court of the State of South Dakota from the said judgment of foreclosure and sale and from the said order denying their motion for a new trial, and from the whole and every part of the said judgment and order, and thereafter, on March 11, 1902, and before this action, the clerk of said circuit court duly made his certificate to the judgment roll and original papers in said foreclosure action and transmitted the same, with his certificate thereto attached, to said supreme court pursuant to such appeal. That thereafter, and before this action, such proceedings were duly had in said supreme court that on June 8, 1904, judgment was duly given and entered by said supreme court, whereby it was by said supreme court duly considered, adjudged, and decreed, that the said mortgage and five thousand dollar note of July 22, 1891, as well as the said two notes of date February 17, 1896, were tainted with usury, and that there was included therein the sum of $1,675.50 usurious interest, and that all the interest apparently due by the terms of said notes was unlawful and should be and was forfeited, and that the said note for $675.50, of date February 17, 1896, was given for usurious interest only upon the said original indebtedness and loan made by said First National Bank to this plaintiff, and that the said five thousand dollar note of July 22, 1891, and said five thousand dollar note of date February
17, 1896, were mere renewals of the said original four notes of
792 one thousand dollars each, of date August 22, 1887, or substitutes therefor, and that the said several four thousand dollar notes given in 1888 and said five thousand dollar note, of date May 22, 1889, were also mere renewals of said original loan of four thousand dollars, or substitutes therefor, and that the said original loan of four thousand dollars made on August 22, — May 22, 1889, and constituted the consideration —, all the said subsequent notes above

described; that on August 22, 1887, this plaintiff duly executed and delivered to this defendant the said four notes for one thousand dollars each, wherein he promised and agreed to pay to the defendant, the First National Bank, interest thereon at the rate of eighteen per cent per annum, and that at that time the highest lawful rate of interest under the laws of Dakota Territory where said notes were executed, to-wit: Laws of 1887 page 401, chapter 207, was twelve per cent per annum, and hence, said notes and the several renewals thereof were usurious under Sections 5197 and 5198 of the Revised Statutes of the United States, and that the said indebtedness contracted on August 22, 1887, continued by means of renewal notes down to the execution of the said note for five thousand dollars of date May 22, 1889, and constituted the consideration thereof, and that the said five thousand dollar note of July 22, 1891, was a mere renewal of said note of May 22, 1889, and was tainted with usury, the sole consideration thereof being the said original loan of four thousand dollars, and that under the said laws of Congress relating to usurious contracts of national banks the interest contracted to be paid by or under said several promissory notes was forfeited, and that the said First National Bank, plaintiff in said action, was en-
793 titled to recover of this plaintiff, the defendant therein, the sum only of four thousand dollars, the amount of the said original loan made on August 22, 1887, as aforesaid, together with taxes paid by said mortgagee upon said mortgaged property and premises, with interest on said taxes, and that a judgment be entered by said circuit court in favor of the said First National Bank, as plaintiff, against this plaintiff and said Maggie McCarthy, as defendants, for the said sum of four thousand dollars, the amount originally loaned by the said First National Bank, to this plaintiff, and also for the said taxes and interest upon the said taxes. That thereafter, and before this action, to-wit: on December 31, 1904, the remittitur and mandate of said supreme court, together with its said judgment and opinion and decision, were transmitted to and filed in said circuit court, and that thereafter, and before this action, to-wit: on January 12, 1905, final judgment was duly given and entered by said circuit court in said foreclosure action in accordance with the said judgment, order, and mandate of said supreme court, for the said sum of four thousand dollars, together with taxes paid and interest on said taxes, and costs of suit, less certain costs theretofore allowed to this plaintiff in that action; the aggregate amount of the said judgment as so finally entered, including taxes and interest upon the taxes, and costs, as aforesaid, being the sum of five thousand nine hundred and fifty-one and 56-100 dollars.

6. That thereafter, and before this action, to-wit: on the 21st day of January, 1905, this plaintiff paid to the clerk of said circuit court for the use of the defendant, the said First National Bank, the full amount of the said judgment, to-wit: five thousand nine hundred
and sixty-one and 91-100 dollars, and on the same day the
794 said judgment was duly satisfied and discharged of record.

7. That before this action this plaintiff duly demanded of the de-

fendant the payment of twice the amount of the usurious interest so paid by him to the defendant, as aforesaid, to-wit: seven thousand six hundred and five and 48-100 dollars, as a penalty under the provisions of Section 5198 of the Revised Statutes of the United States, which demand was by the defendant, before this action, refused, and that no part of the said interest has been paid back to this plaintiff, and that by reason of the premises the defendant is indebted to the plaintiff in the sum of seven thousand six hundred and five and 48-100 dollars, all of which is now due as aforesaid, and remains wholly unpaid.

8. That by reason of the premises, and all the facts above set out, defendant became indebted to this plaintiff in the amount of $7,605.48; whereby an action accrued, according to the provisions of said Section 5198 of the Revised Statutes of the United States.

Wherefore, the plaintiff demands judgment against the defendant for the sum of seven thousand, six hundred and five and 48-100 dollars, with interest thereon at the rate of seven per cent per annum from this date, besides the costs and disbursements of this action.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Plaintiff's Attorneys.

Duly verified by plaintiff January 25, 1905.

"EXHIBIT A."

RAPID CITY, DAK., *Aug. 22d*, 1887.

$1000
795
When Due
11–20
Number
8685

Ninety days after date, I or either of us promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from date until paid, for value received.

And with Attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

P. B. McCARTHY.

(Endorsed on the back thereof as follows:)
Nov. 30 Pd. Int. to 11-20 45.00.
Filed Mar. 20, 1901. William P. Baken, Clerk of Courts, By John P. McElroy, Jr., Deputy.

"EXHIBIT B."

RAPID CITY, DAK., *Aug. 22*, 1887.

$1000

Twelve months after date, I or either of us promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at First National Bank, of Rapid City, Dakota, with

When Due interest at Eighteen per cent per annum from date until paid. for value received, interest payable semi-annually.

8-22 And with Attorney's fees in addition to other costs in case the holder is obliged to enforce pay-

Number ment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

8688 P. B. McCARTHY.

"EXHIBIT C."

RAPID CITY, DAK., *Aug. 22d*, 1887.

$1000 Nine months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid

796 City, Dakota, One thousand Dollars, at First National Bank, of Rapid City, Dakota, with interest at

When Due Eighteen per cent per annum from date until paid, for value received.

5-22 And with Attorney's fees in addition to other costs in case the holder is obliged to enforce pay-

Number ment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

8687 P. B. McCARTHY.

"EXHIBIT D."

RAPID CITY, DAK., *Aug. 22d*, 1887.

$1000 Six months after date, I or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, One thousand Dollars, at First Na-

When Due tional Bank, of Rapid City, Dakota, with interest at Eighteen per cent per annum from date until paid, for value received.

2-22 And with Attorney's fees in addition to other costs in case the holder is obliged to enforce pay-

Number ment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

8686 P. M. McCARTHY.

"EXHIBIT E."

RAPID CITY, DAK., *Aug. 7th*, 1888.

$4000.00 Ninety days after date, we or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, Four thousand and 00-100 Dollars, at First National Bank, of Rapid City, Dakota, with interest at Eighteen per cent per an-

5-3 num from date until paid, for value received.

And with Attorney's fees in addition to other

Number costs in case the holder is obliged to enforce pay-

ment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

11245 P. B. McCARTHY & CO.
P. B. McCARTHY.
M. McGUIRE.
D. J. TIGHE.

797 (Endorsed on the back as follows:)

Nov. 9, ac. Interest $100.00
22 Int. to 11-5 ..... 80.00
Feb'y 6 Int. pd. to 2-3 180

"Exhibit F."

Rapid City, Dak., *May* 22*d*, 1889.

Twelve months after date, we or either of us, promise to pay to the order of First National Bank, of Rapid City, Dakota, Five thousand 00-100 Dollars, at First National Bank, of Rapid City, Dakota, with interest at Twelve per cent per annum from June 22nd 1889 until paid, for value received, payable quarterly. $5000.00

When Due

And with — Dollars Attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. And we further waive all benefits of the Exemption Law of the Territory of Dakota.

Number
12-22

PATRICK B. McCARTHY.
MAGGIE McCARTHY.
MICHAEL M. McGUIRE.

13850

(Endorsed on the back as follows:)
P. B. McCarthy & Co.
Nov. 27, Int. Pd. to 11-22, $250.
M'ch 22, Int. pd. to 3-22-90 $200.
June 5 Int. pd. to 5-22 100.
Sept. 30, Int. paid to Sept. 22, $200.
Dec. 23, Int. paid to 12-22-90 $150.

"Exhibit G."

Rapid City, So. Dak., *July* 22, 1891.

Six months after date, we or either of us, promise to pay to the order of First National Bank, of Rapid City, So. Dak. Five Thousand Dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent. per annum from date until paid, for value received. $5000

When Due

12-28-95

P. B. McCARTHY.
MAGGIE McCARTHY.

Number
13850

798 (Endorsed on the back as follows:)

Feb'y 8th '92 P'd ac. Int	$76.65
Feb'y 29th, '92 P'd ac. Int	45.00
April 28th '92 p'd ac. Int	69.28
Aug. 16 '92, P'd ac. Int. by Hill	60.00
Aug. 18 '92, P'd ac. Int. (Hill)	40.00
Sept. 3rd '92 p'd to ac. Int. Hill	35.00
Sept. 10 '92 p'd ac. int. Hill	15.00
Jan'y 16 '93 p'd on Int	30.00
Feb'y 1st '93 p'd on Int	50.00
March 11th '93 p'd on Int	40.00
March 13 '93 p'd on Int	10.00
April 10 '93 p'd on Int	50.00
May 3 '93 p'd on Int	55.00
May 13 '93 P'd on ac. Int. Hill by Challis	25.00
May 13 '93 P'd on ac. Int. Hill by Challis	25.00
June 6 '93 P'd on ac. Int	50.00
July 10 '93 P'd on ac. Int	50.00
July 25 '93 p'd ac. Int. (Keenan)	25.00
Oct. 5 '93 p'd on ac. Int	25.00
Nov. 16 '93 p'd on ac. Int	25.00
Dec. 23 '93 P'd on ac. Int	20.00
Jan'y 20 '94 P'd on ac. Int. (Keenan)	84.40
Jan'y 26 '94 P'd on ac. Int. (Joe Wallace)	63.25
Feb'y 6 '94 " " " " (Keenan)	40.00
March 3 '94 " " " " "	40.00
April 4 '94 " " " " "	40.00
May 2 '94 " " " " "	40.00
June 5 '94 " " " " "	19.50
July 11 '94 " " " " "	12.25
Sept. 18 '94 by Keenan rent ac. Int	27.75
Oct. 5 '94 by cash (horse note) ac. Int	19.50
Oct. 11 '94 cash ac. Int. (Keenan rent)	10.00
Nov. 9 '94 " " " " "	25.00
Dec. 4 '94 " " " " "	25.00
Dec. 29 '94 " " " " "	1.60
Jan'y 16 '95 by " ac. Int. (Tracey & S.)	15.00
Feb. 11 '95 by " ac. Int. (Tracey & S.)	15.00
March 20 '95 by " ac. Int. (Keenan)	25.00
April 2 '95 by " ac. Int. (Keenan)	25.00
May 6 '95 by " ac. Int. (Keenan)	25.00
June 1 '95 by " ac. Int. (Keenan)	25.00
July 1 '95 " " " " (Keenan)	25.00
Aug. 12 '95 " " " " (Keenan)	25.00

799

Sept. 2d '95 " " " " (Keenan)	25.00
Oct. 2 '95 " " " " (Keenan)	25.00
Nov. 11 '95 " " " " (Keenan)	25.00
Nov. 30 95 P'd cash Int. (Franklin Judg.)	500.65
Dec. 12 '95 P'd cash ac. Int. (Keenan)	25.00
Jan. 2 '96, P'd cash ac. Int. (Keenan)	12.50

277

"EXHIBIT H."

RAPID CITY, SO. DAK., *Feb'y* 17, 1896. $5000

Four months after date, we or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak. Five thousand Dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent per annum from date until paid, for value received. When Due Number

PATRICK B. McCARTHY.
MAGGIE McCARTHY. 24245

(Endorsed on the back as follows:)

July 1, '96, P'd on Int. (Smith & Brown) $30.00
Nov. 25th, '96, P'd on In $50.00

Total number of endorsements of payments is 60.

"EXHIBIT I."

RAPID CITY, SO. DAK., *Feb'y* 17, 1896.

Thirty days after date, we or either of us, promise to pay to the order of First National Bank of Rapid City, So. Dak., Six hundred seventy five & 50-100 Dollars, at First National Bank of Rapid City, So. Dak. with interest at 12 per cent. per annum from date until paid, for value received. $675.50 When Due Number Int. on

PATRICK B. McCARTHY.
MRS. MAGGIE McCARTHY. 13850

(Abs. 1-74.)

On February 17, 1905, and before answer of trial, the court, upon the motion of the defendant, made an order striking out the sixth paragraph of the complaint as irrelevant and redundant, to which the plaintiff duly excepted. (Abs. 88-97.)

Answer.

800 The defendant, by its answer, admitted sundry allegations of the complaint, but the only part of the answer, material to the controversy on this appeal, is the fifth defense, which is as follows:

"And for a further and affirmative defense to the complaint and to the cause of action or causes of action therein set forth, this defendant alleges that the said payments and the said transactions in the complaint mentioned and which are the basis of the plaintiff's cause of action or causes of action, were not made nor did they occur within two years before the commencement of this action, and the cause or causes of action set forth in the complaint did not accrue

within two years next before the commencement of this action; and said cause or causes of action and each thereof is barred by Section 5198 of the Revised Statutes of the United States and the acts amendatory thereof." (Abs. 75-88.)

The case was tried by a jury March 30, 1905. And at the trial the plaintiff identified by the witness, J. S. Gantz, clerk of the court, exhibits numbered one to thirty-six, both inclusive, being the judgment roll and record in the circuit and supreme courts in the foreclosure suit mentioned in the complaint, and all the said records except Ex. 14 were offered and received in evidence. (Abs. 98-108.) Upon the examination of the witness, J. S. GANTZ, the following further proceedings were had, and objections and exceptions made and taken:

I have here Judgment Docket No. 4 of the circuit court of Pennington county, South Dakota, on page 185 of which is a docket of this judgment and decree of foreclosure and sale as modified by the supreme court on appeal.

Q. You may state to the court and jury the record you have there with reference to this judgment, judgment found on page 185 of Judgment Book of Circuit Court, Pennington county, South Dakota, Book 4?

A. Patrick B. McCarthy, et al. judgment debtor First National Bank of Rapid City, South Dakota, judgment creditor; amount of judgment, damages and costs, $5,951.56; date of judgment, January 12, 1905; when filed, January 12, 1905, nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; Judgment Book No. 11, page 350; Name of Court, Circuit; Attorneys of Judgment Creditor, Fred H. Whitfield; Satisfaction of Judgment Record No. 2, page 11; Fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of court.

801

(The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court and objects to the payment or satisfaction of the judgment or the introduction of any evidence relating thereto, and move to strike it out.)

(The plaintiff now asks leave to show by the record offered that as it appears upon the margin, the payment and satisfaction of judgment on the 21st day of January, 1905, and the receipt that the judgment was fully satisfied as appears in this record January 21, 1905, by payment of $5,951.91, signed J. S. Gantz, clerk of court.

The defendant objects for the reason that the entry is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings.

Objection sustained to which ruling the plaintiff duly excepted.)

Q. As clerk of courts, I will ask you if on the 21st day of January, 1905, you were not paid as clerk of this court $5,961.91 in satisfaction of this judgment, in full payment of the judgment, interest and costs to that date?

(The defendant objects as calling for a conclusion of the witness, impertinent, and for all of the reasons offered to the same evidence—counsel knowing from the ruling of the court that it is inadmissible. Objection sustained to which ruling the plaintiff duly excepted.)

802 By Mr. LEWIS:

The plaintiff moves the court to set aside the order heretofore made and filed in this action striking out the sixth paragraph of the complaint as being inadvertently done, and said sixth paragraph being necessary for the full and complete maintenance and presentation of plaintiff's cause of action and the evidence to support the same: that this action being for a statutory penalty under sections 5197 and 5198 of the Revised Statutes of the United States, and the final judgment for the principal sum loaned having been duly rendered in this court January 12, 1905, and duly filed and entered herein, and as is claimed by the plaintiff in this action duly paid and fully satisfied on January 25, 1905, as shown by the record of satisfaction of said judgment, and as claimed by the plaintiff all payments of principal and usurious interests on said original loan not having equalled the sum of four thousand dollars originally loaned and recovered in the judgment mentioned and described in paragraph five of the complaint,—the plaintiff claims that the two years' statute of limitations to commence an action for the recovery of such penalty provided in the statutes of the United States above referred to from the date of the transaction, did not commence until January 21, 1905,—the payment as claimed by the plaintiff of said judgment, and that it is necessary for the plaintiff to show that such judgment was rendered and paid before the plaintiff is entitled to maintain the action, and the plaintiff asks that said sixth paragraph of the complaint be reinstated and that the plaintiff be allowed to give evidence covering the facts alleged in the said sixth paragraph for the reasons above stated.

Which motion was by the court overruled, to which ruling the plaintiff at the time duly excepted.

By Mr. LEWIS:

The plaintiff asks that the record show at this point that the plaintiff excepts to the ruling of the court, the same being contrary to the law of this state and to the statutes of the United States and particularly Section 5198 of the Revised Statutes of the United States which controls all questions in regard to the recovery of penalties of this nature and prescribes the same. Plaintiff insists that the
803 cause of action did not accrue in *this* case until such payment, and the statute of limitations did not begin to run until that time, and that it is necessary for plaintiff to show these facts to maintain his cause of action."

Which request for an exception was by the Court allowed.

Q. Mr. Gantz, I notice that in the judgment docket four of Pennington county on page 185 and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head "satisfaction, remarks, etc," page 185, you have just

entered "fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, clerk of the court;" I will ask you whether or not you paid that money to the plaintiff?

(The defendant objects to the question as cumulative, and calling for a conclusion of the witness, and as assuming a fact not in evidence, and as incompetent, irrelevant and immaterial for all of the reasons stated in the former objection to the offer of proof relative to payment of this or any other judgment.

Objection sustained by the court, to which ruling the plaintiff at the time duly excepted.)

By Mr. Lewis:

The plaintiff excepts to the ruling of the court for all of the reasons last noted under the last previous question, and for the further reason that before the plaintiff can—that if is necessary as a part of the plaintiff's cause of action to introduce evidence of the judgment and payment thereof.

Which exception is allowed by the court.

(The plaintiff then offered in evidence all that part of page 185 of the judgment docket of Pennington county, Judgment Docket No. Four of the Circuit Court of said Pennington county, relating to said judgment of the First National Bank, of Rapid City, South Dakota, vs. Patrick B. McCarthy, et al., as it there appears of record.

The defendant objects to the same as cumulative, and for all of the reasons above noted to this class of testimony, not repeated for the sake of saving the record of needless encumbrance.

Which objection was by the court sustained, to which
804 ruling the plaintiff duly excepted.)

By Mr. Lewis:

The plaintiff excepts to the ruling of the court, for the reason that it is necessary to show the transaction, and that the judgment in controversy was fully paid, and as necessary to the maintenance of his cause of action, and is competent and relevant and material to the issues in this action, and asks that this may be added to the exceptions heretofore taken by the plaintiff to the rulings of the court; the plaintiff excepts upon all the grounds heretofore made herein a matter of exception by him upon the questions propounded to the witness Gantz with reference to the payment or satisfaction of the judgment.

Which exception was by the court allowed and thereupon the witness was excused. (Abs. 108-127.)

The plaintiff also testified on his own behalf, and identified and offered in evidence exhibits 37-46, being the notes and mortgage referred to in the complaint, together with the demand mentioned in the complaint and admitted in the answer, and proof of service of same; and thereby made due proof of each and all of the facts alleged in the complaint. (Abs. 127-150, 198-238, 1277-1313.)

It was admitted in open court that this action was duly commenced on January 25, 1905. No evidence was introduced by the defendants, and thereupon both sides rested and the testimony closed.

The total amount actually collected or received by the defendant from the plaintiff prior to the entry and satisfaction of said judgment, was the sum of $3,802.74, and no more, as appears by the undisputed evidence.

Instruction No. 1 Requested by Plaintiff.

At the proper time the plaintiff asked the court to give each of the following instructions to the jury:

The court instructs the jury that this action is based
805 upon Section 5198 of the Revised Statutes of the United States, relating to national banks, and that the Statute of Limitations governing this action is the one provided for by said Section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you that the final judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said Section 5198 of the Revised Statutes of the United States, did not accrue, and therefore the Statute of Limitations therein provided did not commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by said Statute of Limitations, and your verdict so far as the said limitation of two years is concerned will be in favor of the plaintiff and against the defendant.

Refused,

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*

Instruction No. 2 Requested by Plaintiff.

You are further instructed that the evidence is undisputed that the loan between the plaintiff and bank referred to in the complaint was usurious, and that the interest payments made upon the notes signed by P. B. McCarthy and Maggie McCarthy, dated July 22, 1891, and February 17, 1896, and marked Exhibits 43, 45 and 46, were made by the plaintiff himself, and upon his own behalf, and as to all such payments of usurious interest your verdict will be for the plaintiff if you further find that the defendant through its managing officers knowingly accepted, received and retained the same.

Refused,

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*

806 *Instruction No. 3 Requested by Plaintiff.*

You are further instructed that all payments made by the checks of P. B. McCarthy & Company, and endorsed upon the notes referred to in the complaint as interest received thereon should be credited and found by you as individual payments of the plaintiff, Patrick B. McCarthy, provided you believe from the evidence that the members of said firm so agreed that such payments should be made as the individual payments of the plaintiff, and so applied. And if you find from the evidence that the partners did so agree that said payments should be made and applied as the individual payments of the plaintiff and should be considered as such, then you will find for the plaintiff as to all payments which you may find from the evidence were made by the checks of the firm of P. B. McCarthy & Company.

Refused.

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*

Which the court refused as to each instruction, to which the plaintiff at the proper time excepted. (Abs. 241-253.)

And thereupon at the proper time the defendant made the following motion to the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues:

Both sides having rested, the defendant at this time moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the following reasons, viz:

First. The undisputed evidence in this case shows that the alleged payment of usurious interest were made on or prior to the 10th day of January, 1897, and this action was not commenced until the 25th day of January, 1905, and hence, the said cause or causes of action in the complaint mentioned are barred by the statute of limitations under Section 5198 of the Revised Statutes of the United States, and acts amendatory thereof.

Second. It appears by the undisputed evidence that the
807 alleged payments of usurious interest in the complaint set forth, and constituting plaintiff's cause or causes of action, were all made on or prior to the 1st day of January, 1897, and this action was not commenced until the 25th day of January, 1905, or more than eight years thereafter, and hence, was not commenced within two years from the time the usurious transactions occurred, and, hence, are barred by the Statute of Limitations under Section 5198 of the Revised Statutes of the United States and acts amendatory thereof.

Third. The undisputed evidence shows that the payments or usurious transactions in the complaint mentioned, which are the basis of the plaintiff's cause or causes of action, were not made, nor did

they occur within two years before the commencement of this action, and, hence, are barred by the Statute of Limitations under Section 5198 of the Revised Statutes of the United States and acts amendatory thereof.

Fourth. The undisputed evidence shows that the cause or causes of action set forth in the complaint did not accrue within two years before the commencement of this action, and said cause or causes of action, and each thereof, are barred by Section 5198 of the Revised Statutes of the United States and the acts amendatory thereof.

And the court thereupon granted said motion, and directed the jury to return into court a verdict in favor of the defendant and against the plaintiff upon all the issues; and a verdict was returned by the jury accordingly, to which the plaintiff at the time duly excepted. (Abs. 253-263.)

At the trial and before the entry of judgment herein, the plaintiff took and filed exceptions to the said charge of the court, and to its said order withdrawing the case from the jury and directing a verdict for the defendant, upon the same grounds as are set out and specified in the assignment of error at the close of the abstract, and also in the specification of errors appended to and made a part of the statement of the case, which exceptions are as follows:

Exceptions to Charge of Court.

808 Comes now the above named plaintiff after the court's instructions to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and before the entry of judgment herein, and excepts to the court's instruction to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the reasons and upon the grounds following, to-wit:

1. It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action, and is not barred by Section 5198 of the Revised Statutes of the United States or by any other statute of limitation.

2. It appears by the undisputed evidence that the plaintiff's cause of action accrued within two years next before the commencement of this action, and that the same is not barred by the provisions of Section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

3. There is no evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action, or that the same is barred by Section 5198 of the Revised Statutes of the United States.

4. There is no evidence to support the said direction of the court to the jury to return a verdict herein in favor of the defendant and against the plaintiff upon all the issues and the said direction and instruction of the court is contrary to the evidence, and contrary to law and contrary to the provisions of said Section 5198 of the Revised Statutes of the United States.

5. It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and against the plaintiff on the 12th day of January, 1905, and not before; and that the total payments at any time made by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in
809 August 1887; and that the plaintiff's cause of action to recover a penalty under the provisions of said Section 5198 of the Revised Statutes of the United States did not accrue until the said 12th day of January, 1905, and was therefore not barred by the provisions of said Section 5198.

6. It clearly appears from the evidence that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the evidence clearly shows that the plaintiff paid to the defendant, and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged, and the verdict should have been for the plaintiff and against the defendant for the amount claimed in the complaint.

7. For all the reasons above stated, the court erred not only in giving such instructions, but in withdrawing the case from the jury and ordering a verdict for the defendant herein, and the said charge and ruling of the court is contrary to the evidence and contrary to law, and is not sustained by the evidence.

CHARLES W. BROWN,
SCHRADER & LEWIS,
Plaintiff's Attorneys.

Which foregoing exceptions of the plaintiff to the court's said ruling and instruction were duly made at the time of the giving of such instruction, and are by the court hereby allowed and ordered to be made a part of the record of this case and filed herein, this 31st day of March A. D. 1905.

By the Court.

LEVI McGEE, *Judge.*

[SEAL.] J. S. GANTZ, *Clerk.*"

(Abs. 263-273.)

Thereafter notice of intention to move for a new trial having been duly served by the plaintiff, and a statement of the case containing all the evidence, rulings and proceedings of the court, having been duly settled (Abs. 274-280, 1315-1319), the plaintiff within
810 the time allowed by law duly moved the court for a new trial, upon the same grounds and for the same causes as are set out and specified in the assignment of error at the close of this abstract, and also in the specification of errors appended to and made a part of the statement of the case; and on December 2, 1905,

the court entered it- order denying said motion, to which the plaintiff duly excepted. (Abs. 1322-1325.) And thereafter this appeal was duly perfected from the whole and every part of said judgment and order.

And there being no dispute as to the facts, the sole question now presented upon the merits is, whether the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of Section 5198 of the Revised Statutes of the United States.

Brief of Argument.

I.

Under section 5198 of the Revised Statutes of the United States, the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt.

McBroom v. Investment Co., 153 U. S. 318.
Investment Co. v. McBroom, (N. M.) 30 Pac. 859.
Duncan v. First Nat. Bank, 8 Fed. Cases, 11.
First Nat. Bank v. Denson (Ala.) 22 So. 518.
Haseltine v. Cent. Nat. Bank (Mo.), 56 S. W. 895.
First Nat. Bank v. Childs, 130 Mass. 519.
First Nat. Bank v. Turner (Kan.) 42 Pac. 936.
811 First Nat. Bank v. McInturff (Kan.) 43 Pac. 839.
Louisville Tr. Co. v. Ky. Nat. Bank, 102 Fed. 442.
Same v. Same 87 Fed. 143.
Harvey v. Nat. L. Ins. Co. 60 Vt. 209; 14 Atl. 8.
Cotton States Bldg. Co. v. Peightal 67 S. W. 524.
Wheaton v. Hubbard, 20 Johns. 290.
Stevens v. Lincoln, 7 Met. 525.
Saunders v. Lampert, 7 Gray, 484.
Smith v. Robinson, 10 Allen, 132.
Hall v. First Nat. Bank, 30 Neb. 99; 46 N. W. 151.
Kendall v. Crouch (Ky.) 11 S. W. 587.
Talbot v. First Nat. Bank, 185 U. S. 172.
Talbot v. Sioux Nat. Bank, 185 U. S. 182.

The case of Duncan v. First National Bank, supra, is directly in point, and is also a decision of the very highest authority for the reason that the rule of law there laid down has been followed in other important cases, and was also quoted and approved by the Supreme Court of the United States in the McBroom case; it therefore merits special study and consideration. In that case it was ruled, that national banks which have taken usurious interest may, notwithstanding the giving of successive renewal notes, apply such interest to the principal at any time before the principal is actually paid or judgment is entered for it, and that after such payment, or entry of judgment, the right of action to recover the penalty given by Section

5198 of the U. S. Revised Statutes becomes complete, and the limitation of two years begins to run; and Judge Ketcham in his charge to the jury stated the facts as follows:

"GENTLEMEN OF THE JURY: These are cases brought by the plaintiffs to recover from the defendant the penalty for taking usurious interest under the thirtieth (30th) section of the
812 national bank law of June 3, 1864, (13 Stat. 108). By agreement of counsel both theses cases, William Duncan & Brother and Benjamin Millinger, are tried by you together. The plaintiffs, as you have seen in the course of the testimony at different times, loaned money of the defendants, Duncan & Brother, at three different times; $500 on January 30, 1873, $4,000 on July 9, 1873, and $500 July 18, 1873. Benjamin Millinger loaned $250 January 27, 1873, and $274.35 January 15, 1875. At the time of the loan in each case the bank retained nine per cent as discount and credited the plaintiffs with the balance, taking their notes respectively for the full amount of proceeds and discount. The notes of Duncan & Brother were not paid at maturity, but were renewed from time to time. The first note of $500, of January 30, 1873, was renewed till the fall of 1874. It had been reduced by payments to the sum of $150. The note of July 9, 1873, for $400, was renewed till October, 1874. The note of July 8, 1873, for $500 was renewed till November, 1874. At each renewal nine per cent interest was charged, and was paid by the plaintiffs. These notes were all sued and judgment obtained upon them for the face of the notes or the principal, before the bringing of this suit. The Millinger notes were renewed, the note of January 27, 1873, for $250, from time to time till March, 1874, when it was paid in full; the note of January 15, 1875, for $274.35, was renewed at the end of three months, for two months, and then for one month, and remained unpaid until suit was brought upon it. Judgment was obtained upon it for the full amount and interest from maturity to judgment. Interest was charged at each renewal at nine per cent. No credit was given on the principal of any payment of interest by way of reducing the principal of either of the notes of Millinger or Duncan & Brother. Judgment was entered for the notes in full, independent of interest. And the note that Millinger paid he paid in full without reduction of any payment made of interest. The nine per cent that had been paid and retained was left entirely out of the computation. * * * The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and
813 the judgments on all the Duncan & Brother notes were entered, near the time of bringing these suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run. These actions were brought February 1, 1876; so that they are within the statute. * * * The amount of interest charged in these cases is computed, and is agreed upon by counsel of both parties as correctly computed. It amounts in the case of Benjamin Millinger

to $38.02. In the case of William Duncan & Brother to the sum of $629.91. It is the amount of interest retained and paid upon each of the notes sued by defendants up to the entry of judgment, and upon the note paid by Millinger to the time of the payment. You will find double the amount in each case for the plaintiffs respectively."

And in that case, the court laid down the following rule of law, quoted and approved by the Supreme Court of the United States:

"In case a greater rate of interest has been paid the person by whom it has been paid, or his legal representative, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or recovering the same, provided such action is commenced within two years from the time the usurious transaction occurred. From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgments, there is a locus penitentiæ for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. When payment is actually made, or judgment is entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete."

814 Our proposition of law is stated in the exact language used by the Supreme Court of the United States in the McBroom Case, in which it was held that an action for the recovery of the penalty could not be maintained until at least the principal of the original loan had been paid; and Mr. Justice Harlan, speaking for the court, said:

"The Contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all payments—collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years, within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and therefore, the cause of action does not accrue, until the lender has actually collected or received more than the

original debt with legal interest. These conclusions are supported by adjudged cases.

In Duncan vs. First Nat. Bank of Mt. Pleasant, in the district court of the United States for the Western District of Pennsylvania, it was said: 'From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a locus penitentiæ for the defendant a certain mort-
815 gage bearing even date then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete.' Nat. Bank Cases, 360, 362."

McBroom v. Investment Co., supra.

That case, it is true, construed the statute of New Mexico; but it will be seen that the question is the same, whether arising under the New Mexico statute, or under the cited section of the National Bank Act. The language of the New Mexico statute quoted in that case is as follows:

"And such person, persons or corporation shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators or assigns, double the amount so collected or received, upon any action brought for the recovery of same within three years after such cause of action accrued."

And the language of Section 5198 U. S. Revised Statutes is:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

In the one case the language is: "Within three years after such cause of action accrued." And in the other case the language is: "Within two years from the time the usurious transaction occurred."

Both phrases, we submit, mean exactly the same thing. But the Federal statute forfeits the entire interest, while the New Mexico statute seems to forfeit the excess only above the legal rate. Speaking of the two statutes, the New Mexico supreme court, whose
816 decision was affirmed by the U. S. Supreme Court, said:

"While the phraseology differs, the two statutes provide for substantially the same thing,—the recovery of usurious interest within a given time 'after such cause of action accrued,' (the New Mexico statute,) or, 'from the time the usurious transaction occurred,' (the national statute.) The construction given to his latter statute is that the limitation runs from the date of the last payment. Duncan v. Bank, 1 Thomp. Nat. Bank Cas. 362; Brown v. Bank, 72 Pa. St. 209; Kearney v. Bank, (Pa. Sup.) 18 Atl. Rep. 598; Harvey v.

Insurance Co., 14 Atl. Rep. 8, 9. And, indeed, upon reason as well as upon authority, we think this is the proper construction, if we are to give effect to the contract out of which the usurious transaction grows. If the contract is valid to the extent of the principal and legal interest, there seems to be no sound reason why the borrower should be allowed to recover as a penalty twice the amount of the usury, while he is still indebted to the lender the entire amount of principal and legal interest."

Investment Co. v. McBroom, 30 Pac. 859.

First National Bank of Gadsden v. Denson, supra, is on all fours with the case at bar, the facts and the history of the prior litigation being substantially the same; and for clearness of statement and closeness of reasoning there is nothing finer in the adjudged cases than the following from the Alabama supreme court, construing Section 5198 of the U. S. Revised Statutes:

"The settled construction of the last clause of this statute, in respect of its limitation of the time within which suit to recover back usury paid must be instituted, is that the 'usurious transaction' occurs only when a greater amount than the principal, with legal interest, has been paid, or judgment has been taken for such greater amount; and hence that the time of the limitation does not begin to run until the creditor has received, in the way of payment of principal and usurious interest, a sum in excess of the principal and legal
817 interest, or has taken judgment for such excessive sum. The theory upon which this construction proceeds is that the creditor primarily has an election to repent him of his usurious exaction, which may be made or evidenced by crediting all payments received, whether intended at the time they are made to be of usury or not, on the principal and legal interest; that, so long as he has this locus penitentiæ, it is to be assumed that he will avail himself of the right it gives him to purge the transaction of illegality; and that, of consequence, it cannot be affirmed until the contrary election has been made, by receiving more than the debt and legal interest, or taking judgment therefor, that he has received usurious interest, and until then the 'usurious transaction' has not been consummated, and has not 'occurred,' within the meaning and intent of the statute. Thus, in Bank v. Duncan, Thomp. Nat. Bank Cas. 360, 362, Fed. Cas. No. 4,135 (an action for usury paid, decided by a federal district court), it is said: 'From the origin of the loan, from the retaining of the first discount through all the renewals, up to the time of the final payment of the principal, or up to the time of the entering judgment, there is a locus penitentiæ for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made, or judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full, without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the

other Millinger note and the judgments on the Duncan notes were entered, near the time of bringing these suits, less than two years before. The payment (of the one Millinger note) and the judgment (on the other Millinger and the Duncan notes) concluded the transaction, and determined their character to be usurious. Till that time it was undetermined, and the statute did not begin to run.' This language is quoted with approval by the Supreme Court of
818 the United States in McBrown v. Investment Co., 153 U. S., 318, 328, 14 Sup. Ct. 852, 856, where a like ruling was made in respect of a statute of New Mexico which was in substance the same as the Federal statute quoted above in the respect under consideration. * * * The debtor obviously has nothing to do with the exercise of the creditor's option. He has no locus penitentiæ,—no place nor time nor opportunity to repent of anything or to ratify anything. His payment of usurious interest, as such, is as clear a manifestation of a confirmation and consummation of the usurious transaction as is possible for him to make, and yet that has no such effect upon it. The institution of an action by him to recover back usurious interest so paid is an equally unequivocal assertion of a consummated usurious transaction, and yet it has no such effect; and his action, as in the McBroom's Case, supra, will go out of court because prematurely instituted, because no cause of action had arisen, unless he shows that such, with other payments, exceed the principal of the loan and legal interest. Nothing, in short, that he can do or forego, can hasten or impede the rounding out of the transaction into a consummated payment of usurious interest, so long as he has not paid more than the debt and legal interest, or in the least clog or facilitate the unfettered election of the creditor to purge the payments of usury by crediting them upon the loan and interest. His plea of usury, when sued for a balance of the principal and interest thereon, is no more than an assertion that the contract is tainted with usury. It is much less an affirmation by him that usurious payments have been made than the payments themselves were, or than a suit to recover them back is. Indeed, such plea does not at all assert that usurious payments have been made. That is not the gist of it at all; but its gravamen is that usury was contracted to be paid, and relief upon it, so far from involving an adjudication that usurious interest has been paid, is, to the contrary, an adjudication that no interest has been paid on the particular debt in suit. The interposition of such a plea in a suit on a past-due renewal note for a part of the original loan has no effect upon the right of the creditor plaintiff to apply usurious interest previously paid on the loan, as evi-
819 denced by the original or intervening renewal notes, to the principal and legal interest, and thus purge such payments of usury, and forestall the possibility of the transaction, so far as the payments made were concerned, becoming a 'usurious transaction,' within the meaning of the statute. * * * Upon the foregoing considerations, our conclusions are that plaintiff's action is not barred by the limitation embraced in Section 5198, Rev. Stat., and that his right to maintain it is not affected by the fact that he pleaded usury against the note for a balance of the original loan in the suit

upon it by the bank, and upon such plea had judgment forfeiting the interest on that note."

In Hazeltine v. Central Nat. Bank, supra, the facts and the contention of the defendant and appellant, as well as the common law rule, were thus stated:

"This case is the counterpart of the case of Bank v. Hazeltine (just decided) 55 S. W. 1015. It is an action, under section 5198, Rev. St. U. S. 1878, to recover $831.70; that being double the amount of the usurious interest paid by plaintiffs to the defendant on a note for $2,240, on which the defendant obtained judgment against the plaintiffs in the other case referred to. It is conceded that the plaintiffs paid the defendant the sum of $415.85 to procure extensions of the note for $2,240, from time to time, between October 29, 1894, and June 14, 1895. It is also conceded that such payments were for usurious interest, and that the defendant, in accepting and receiving the usury, has violated the federal statute. The sole defense is that the party who has paid usurious interest cannot maintain an action under that statute to recover twice the amount so paid, until he has paid the principal sum due, or, at least, unless he tenders the principal; and it is admitted that the plaintiffs have not done this. In support of this contention the defendant relies upon Wheaton v. Hibbard, 20 Johns. 293; Hawkins v. Welsh, 8 Mo. 490; Rutherford v. Williams, 42 Mo. 18; Livingston v. Burton, 43 Mo. App. 272; and McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852, 38 L. ed. 729. In the New York case it was pointed out that the statute of that state permitted a
borrower to recover the excess of interest, over the legal
820 rate paid, in an action of debt, if the suit was begun within one year, and, if the borrower did not sue within such year, then any other person could institute such action within the second year, and one half of the recovery went to the person suing, and the other half to the poor of the town in which the offense was committed. It was also shown that at common law, under the statute of 12 Anne, c. 16, "the party receiving more than the legal rate of interest, forfeited the treble value of the moneys or things lent," to be recovered in an action for money had and received. 'But the party injured cannot recover any part of the principal and legal interest, and, to entitle him to maintain the action, he must show that he has done all that equity requires, Bacon, Abr. tit. "Usury" (G); 1 term R. 153.' And it was held that the statutory remedy did not supersede the common law remedy, but that the remedies were concurrent. The suit was not brought until more than two years after the offense was committed, and it was held that the action was under the common law remedy, and that at common law the suit could not be maintained so long as the principal and legal interest remained unpaid, but, as the defendant had not pleaded or proved that it had not been paid, it would be inferred that it had been paid."

And in that case, after quoting at length from the decision of the U. S. Supreme Court in the McBroom case, the Supreme Court of Missouri further said:

"This must be taken as an authoritative interpretation of the meaning of Section 5198, Rev. St. U. S. 1878, and, as that is a federal statute, the construction thereof by the supreme court of the United States must be followed by this court. Under the rule there laid down, the plaintiffs herein are not entitled to maintain this action, for there is no allegation or proof that they have paid or offered to pay the debt actually due; that is, the amount actually received by the plaintiffs from the defendant. It is contended, however, by the plaintiffs that the decision of the supreme court of the United States in Brown v. Bank, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. ed. 801, establishes a different rule, and authorizes a recovery in this case. This is a misapprehension. Mr. Justice Harlan delivered the opinion in the McBroom Case, and also
821 in the Brown Case, and in the Brown Case he cites and reaffirms the McBroom Case. In the Brown Case it did not appear how much of the usurious interest had been paid, and how much was included in the face of the note. It was argued, however, that including it in the face of the note was a payment, but the supreme court held that not to be the law. The rule is clearly laid down, however, that, if usurious interest is included in the face of the note, it should in a suit on the note, be credited on the note or eliminated from the note, but no action could be maintained under section 5198 to recover it, because it had not been actually paid, and that only usurious interest actually paid could be recovered under that section. This is all that the Brown case decides. The question whether an action for usurious interest actually paid could be maintained without allegation and proof that the debt itself had been paid, or without an offer to pay it, was not raised, discussed, or passed on in the Brown Case, except so far as approving the McBroom Case, which so held, may be regarded as an inferential determination of that question; and, so regarded, it cuts off the plaintiffs' right to maintain this action. Thus, it will be seen that the Supreme Court of the United States puts the same construction upon the federal statute that courts of equity and the courts of law where the statute of 12 Anne is in force, place upon the rights of the borrower and lender; that is, that courts will neither aid the lender to collect usurious interest promised to be paid, nor will they aid the borrower to recover such usurious interest actually paid unless he has paid or offers to pay the amount of money actually received from the lender. The judgment of the circuit court is therefore reversed, and the cause remanded, to be proceeded with in accordance herewith. All concur."

And the Missouri court in the same case said, that the McBroom Case was an action under the statute of New Mexico, by a borrower to recover double the amount alleged to have been paid by him to the lender as usurious interest, and that "the statute of New
822 Mexico in this regard is very much like the National bank act, except that the limitation is three years instead of two."

In First National Bank of Peterborough v. Childs, supra, the rule is thus stated by the supreme court of Massachusetts:

"The statute, in §5198, provides for the forfeiture of all the interest which the note carries with it, where the bank has taken

or reserved or charged a higher rate than the law allows. The maker of the note can avail himself of this provision in defence of an action on the note, and in no other way. Farmers' & Mechanics' Bank v. Dearing, ubi supra. The same section provides, further, that if the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the bank taking or receiving the same. This remedy is applicable when the note has been paid, and, ordinarily at least, not till then, and can be availed of only in the form prescribed by the statute, that is to say, by action against the bank."

In Louisville Trust Company v. Kentucky Nat. Bank, supra, the facts were that the plaintiff was the assignee of W. H. Thomas & Son for the benefit of creditors; that Thomas & Son made to the defendant a note for $30,000 on July 8, 1893, and on that date paid the defendant $373.33, as usurious interest or discount; that the plaintiff in April, 1894, paid the note in full with interest, and commenced action on December 13, 1895, for the recovery of the penalty under section 5198 U. S. Rev. St. And it was held, that the plaintiff was entitled to recover twice the amount of the usurious interest paid on the $30,000 note, including the said sum of $373.33 paid on July 8, 1893, and more than two years before the commencement of the action, the court saying:

"It is contended that the interest thus paid in separate transactions cannot be the basis of a recovery for double its amount
823 merely because in the previous transactions usurious interest had been charged; that the payment of the usurious interest was an illegal transaction, and stood apart; and that to punish the defendant for taking lawful interest in a separate transaction was not contemplated by congress in section 5198. But the express decisions of the Supreme Court have closed the question. The only illegal charge, it is true, in respect to the $30,000 note made by the defendant, was in the original discount, which embraced usurious interest. Upon that illegal transaction the penalties of the statute must, of course, be visited. In the case of Brown v. Bank, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. ed. 801, and more particularly in that of McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852, 38 L. ed. 729, the Supreme Court holds that double all the interest charged or chargeable on a note under like circumstances should be recovered, whether taken out more than two years before suit was brought or not. These decisions proceed upon the idea that the person receiving the usury may, at any time before the principal of a particular note is paid, repent, and credit it in settlement upon the debt, or treat it as having been paid upon principal, or else refund it outright; and, indeed, the principle has been carried to the extent of being applied where a note which in fact included usury has been renewed. But in this case the $30,000 note did not include any usury, and was never renewed. But for the decisions referred to, it might be possible to hold that what was retained as discount on July 8, 1893, was actually paid on that date, and therefore barred, and that what was paid afterwards was lawful. But they

forbid such a ruling. The case before us is not one where, the principal debt being sued for, the interest may be abated because of usury. It is an action to recover the penalty of double the interest which 'has been paid' upon the ground that some of it was usurious."

Louisville Trust Co. v. Ky. Nat. Bank, 102 Fed. 446.

In First National Bank v. McInturff, supra, the supreme Court of Kansas held that a cause of action would not arise for the
824 penalty prescribed by section 5198 of the U. S. Rev. St. until a sufficient amount had been paid to cover the principal of the loan, and said:

"The defendant in error brought this action in the district court of Reno county to recover the penalty provided by sections 5197 and 5198 of the Revised Statutes of the United States for the charging and receiving of certain usurious interest upon the part of the plaintiff in error. From a judgment in favor of the defendant in error the bank brings the case here for review. The facts in this case are practically agreed upon, and the law, in our opinion, is fully established in this state. The petition of the plaintiff below as amended, and upon which the case was tried, alleged a number of separate causes of action, but it is admitted by counsel, and the record discloses, that these various causes of action arise upon three separate and distinct series of notes. That which we may denominate the first series consists of an original note and several renewals, upon which certain payments have been made, but not a sufficient amount to pay the principal sum of either of the said notes. The payments which were made were in the nature of usurious interest, and the trial court allowed the plaintiff below to recover the penalty prescribed by the statute upon this series of notes. It is contended by the defendant in error that the record discloses that the bank treated each of the renewal notes as a payment of the note formerly given, and that, therefore, he was entitled to recover upon each of said notes so treated by the bank as having been paid. This position is not well taken. Each of the notes given after the maturity of the original note of this series was simply a renewal, and was so treated by all parties. Any payment which may have been made upon either the original or either of the renewals of this series would, in an action brought upon said note, be credited as payment upon the principal sum, all interest being forfeited in the event that it was shown that the transaction was tainted with usury. But a cause of action would not arise for the penalty prescribed by statute until a sufficient amount had been paid to cover the principal sum represented by said series of
825 notes. Bank v. Turner (Kan. App.) 42 Pac. 936. * * *

It follows from the views herein expressed that the trial court erred in permitting a recovery upon the first series of notes."

II.

At common law, the borrower could not recover the penalty given by the statutes relating to usury, without paying or offering to pay at least the principal of the loan, and the decisions in the Duncan and McBroom cases result from the application of common law prin-

ciples, including the doctrine of locus penitentiæ, to the national bank act.

Wheaton v. Hibbard, 20 Johns., 290.
Investment Co. v. McBroom (N. Mex.) 30 Pac. 859.
Stevens v. Lincoln, 7 Met. 525.
Saunders v. Lambert, 7 Gray, 484.
Smith v. Robinson, 10 Allen 130.
McBroom v. Investment Co., supra.
Hazeltine v. Central Nat. Bank, supra.
First Nat. Bank v. Denison, supra.

The common law rule is thus stated by Chief Justice Spencer in Wheaton v. Hibbard:

"By the 12 Anne, ch. 16, the party receiving more than the legal rate of interest, forfeited the treble value of the moneys or other things lent. It is contended that the person who pays above the legal rate of interest is confined to the statute remedy, and that he must not only sue in an action of debt, but that the suit must be within one year, or he is forever precluded. Now the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed, giving a further remedy, without a negative of the common law remedy, expressed or implied, he may, notwithstanding the statute, have his remedy by action at common law. (1 Com. Dig., Action on Stat., C.) There are no words in the statute, either expressly or impliedly, negativing the common law remedy.
826 The injured party cannot have both remedies, and if he neglects to pursue the statute remedy for more than a year, his right of action at common law would be suspended during the second year, for, peradventure, a third person may prosecute. But, in the present case, the excessive interest was received in 1816 and 1817. It was incumbent on the defendant to show, had the fact been so, that he had been sued within the second year; and not having shown this, the statute remedy is gone. It is undeniable, that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to complete their ruin. In such a case, the maxim of potior est conditio defenditis has never been applied. But the party injured cannot recover any part of the principal and legal interest; and to entitle him to maintain the action, he must show that he has done all that equity requires. (Bacon, Usury, G.; 1 T. R. 153.) In this case, had the objection been made that the principal was unpaid, the defendant in error ought to have proved such payment. But the objection was not made; and it seems to me, that when the cause has been litigated on other and different grounds, we are to intend, by the silence of the plaintiff, in not making the objection, that the fact is, that the principal and interest have been paid. It is a salutary rule, not to suffer an objection to be made when the case comes up for review, which might have been obviated, had it been made at the proper time. The principle is

sound, that the court can intend nothing in a special verdict but what is found by the jury. (1 Wils., 55; 1 Cal., 64.) This case I conceive not to be within the rule. The excess beyond legal interest was money to which the plaintiff in error had no right; it belonged to the defendant in error; and he shows a state of facts entitling him to it. Now, what rebuts the justice and equity of his case? What deprives him of his right to regain what has been wrongfully taken from him? The fact that the principal and interest have not
827 been repaid. That, then, is matter of defense to be shown on the other side; and as the negative could not be proved, it would be enough to state the objection, and throw it on the party to prove payment. But when the defense is not made, nor the objection stated, the inference is that the fact did not exist. This is not inferring a fact, but it is rebutting a presumption."

The New Mexico supreme court in the McBroom Case gives an excellent history of the earlier decisions on usury, and points out that the error of many of them arose from a failure to apply the doctrine of locus penitentiæ, which later became fully established:

"These and many other cases which might be cited to the same effect hold that, within the meaning of the statute which defines the offense and limits the time within which an action may be brought to recover the penalty, the right of action accrues whenever any money is reserved or received by the lender which is intended at the time of such reservation or reception to be applied in the satisfaction of the usury. This construction cuts off entirely the locus penitentiæ, and taints the transaction in its very inception. The reason for this construction is thus stated by the supreme Court of Pennsylvania in the case of Kirkpatrick v. Houston, supra, as follows: 'Any other interpretation of the act would put it in the power of the lender to stamp the character of guilt or innocence on it at the precise point of time convenient for him to elude the prosecution by means of the limitation attached to it. Should the borrower sue at the receipt of the first payment, he might be told that he was too soon; should he wait until the whole was paid, he might be told that the offense had been committed long before, and that the year had gone by.' In this case, however, the learned chief justice (Gibson) uses a single expression that, in our opinion, militates strongly against the doctrine contained in the quotation just given, and furnishes excellent grounds for reaching a different conclusion. He says: 'I will not say that the defendant might not lawfully receive pro tanto payment specially in discharge of what was lawfully due, for
828 it is the corruption of taking, and not the corruption of the contract, which constituted the offense to which the penalty is annexed.' The doctrine of this case, therefore, fixes the liability of the lender absolutely by the receipt of any part of the usury as such, and henceforth there is for him no locus penitentiæ. The same construction which gives a right of action under the statute just as soon as any portion of the usurious interest has been received, without regard to whether any portion of the sum advanced has been returned, as a rule treats such contracts void as to the whole transaction. * * * It sheds much light on the subject to note the

fact that the tendency of more modern legislation and judicial determination of this question has been in the direction of mitigating the rigor of the common law rule that treated all transactions tainted with usury as void, and which also treated any exaction of usurious interest as an offense against as well the moral senses and the laws of God as against those of the realm. * * * So, also, in the state of Massachusetts we have already seen the doctrine held in the case of Com. v. Frost, (decided in 1809,) that the offense of usury is complete if more than the legal interest is paid at the time of the loan whether the principal sum is ever refunded or not; and yet it has since been held by the same court that there can be no recovery of usury until the principal and legal interest have been paid; that, up to the receipt of the last payment, the lender has his locus penitentiæ. Stevens v. Lincoln, 7 Mete. (Mass.) 525; Saunders v. Lambert, 7 Gray, 484. So, also, the doctrine laid down in the case of Nelson v. Cooley, 20 Vt. 204, supra, (decided at the February term, 1848,) is in effect overruled by the same court in the case of Harvey v. Insurance Co., (decided at the May term, 1888,) 14 Atl. Rep. 7.

III.

In Conclusion.

The instructions given and refused and the rulings of the court below are erroneous for the reasons assigned, and we think require no further discussion. It will be found, that the authorities which will be cited by opposing counsel ignore or cut off entirely
829 the doctrine of locus penitentiae, and are therefore erroneous, and contrary to the decision in the McBroom Case. The inexorable logic of the Duncan, McBroom and other cases cited by us leave the defendant not a leg to stand on. Some shallow annotators, and even some judges, have attempted to cast doubt upon the authority of the Duncan Case for failure to distinguish between an actual payment and a mere reservation of usury. But in the Duncan, the Alabama and the Kentucky National Bank cases, the interest was paid as interest, and the plaintiff was permitted to recover a penalty for interest actually paid more than two years before the action, but within two years after the principal of the original loan had been paid or reduced to judgment. The rule laid down in the Duncan Case has been adopted as the rule of the Supreme Court of the United States, and is so plain that it cannot be explained away: "From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a locus penitentiæ for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. Up to that time he may make his election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete."

Nor is there any ambiguity in the language used by Mr. Justice Harlan in the McBroom Case:

"And interest cannot be said to have been collected or received in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all payments—
830–853 collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue until the lender has actually collected or received more than the original debt with legal interest. These conclusions are supported by adjudged cases." (Then citing and quoting the Duncan Case.)

And this clear and unequivocal construction of the statute was approved and followed, after great consideration, in the well reasoned Alabama and Missouri cases, in which, as in the case at bar, there were years of litigation to determine the usurious character of the indebtedness, and in which those high courts held that the cause of action to recover the penalty given by the Federal statute did not accrue until the principal of the original loan has been paid, or reduced to judgment. And such conclusion, as we have seen, is in harmony with the rules of the common law and the principles of equity.

In the case at bar it is undisputed, that the original loan was $4,000, and that the total payments made thereon from the origin of the indebtedness up to the entry of judgment for the principal of the loan, aggregated $3,802.74, and no more.

Wherefore, the appellant prays a reversal of the judgment, and a new trial of this action.

Respectfully submitted,

CHARLES W. BROWN.
SCHRADER & LEWIS.

Rapid City, Oct. 31, 1906.

* * * * * * *

854 And afterwards, to-wit, on the twenty first day of May, A. D., 1909 an opinion was handed down affirming the judgment and order of the Circuit Court, which said opinion is in words and figures, as follows, to-wit:

855 2361 "W" —*a*—

In the Supreme Court, State of South Dakota.

PATRICK B. MCCARTHY, Appellant,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Respondent.

Appeal from Circuit Court, Pennington County.

Opinion.

Filed May 21, 1909.

856 Charles W. Brown, Schrader & Lewis for appellant. Buell & Gardner, for respondent.

WHITING, *J.:*

This cause comes before this court upon an appeal from the judgment of the Circuit Court and from the order of said court denying a new trial. The action was one brought by the plaintiff and appellant, Patrick B. McCarthy, against the defendant and respondent, First National Bank of Rapid City, to recover penalties in the sum of $7,605.48, being twice the amount of usurious interest which plaintiff claims he paid to the defendant and that defendant received in violation of sections 5197 and 5198 of the United States Revised Statutes. For the purposes of this appeal the following facts may be taken as established. In August 1887 plaintiff loaned of defendant $4,000 evidenced by four promissory notes of $1,000 each, payable three, six, nine and twelve months after date with interest on each note at eighteen percent per annum until paid. These notes were extended until August 7th, 1888 when a new note in the sum of $4,000 was given by plaintiff, his wife, and one other party. This note was due in ninety days with interest at eighteen percent per annum. Considerable interest upon this note was paid but no part of the principal and on May 22nd, 1889 a new note was given signed by plaintiff, his wife, and a third party which said note was for $5,000 due in one year bearing interest at twelve percent per annum. Nine Hundred dollars was paid and indorsed as interest upon this note and on July 22nd, 1891 a new note of $5,000 was given by plaintiff and his wife the same due in six months bearing interest at twelve percent per annum. This last note was secured
857 by a mortgage upon real estate belonging to the makers.

It is admitted that the only consideration for this last note was the original $4,000 loaned to plaintiff together with certain usurious interest upon such original loan. It is admitted that the plaintiff made a large number of payments dating from February 8th, 1892 down to January 2nd, 1896 upon this note, all of which payments were indorsed upon said note as interest, and upon February 17th, 1896 the plaintiff and his wife gave to defendant two

notes in renewal, one for $5,000 due in four months with twelve percent interest, the other for $675.50 due in thirty days with twelve percent interest, this last note purporting to be interest upon the note of July 22nd, 1891. Payments as and for interest were made upon the last $5,000 note, the last payment being made on or before January 1st, 1897. It is alleged and admitted that the total payments by way of interest and which were by the defendants applied as interest upon the several notes aggregated the sum of $3,802.74, for twice which the plaintiff brought this action.

On January 25th, 1897 the defendant in this action commenced an action against the plaintiff and his wife for the foreclosure of the mortgage securing the above mentioned notes, and to recover the amount due by the terms of said mortgage and notes thereby secured. The plaintiff herein appeared as defendant in said action, set up the facts hereinbefore stated in regard to the usurious interest on the original notes, and prayed that said mortgage and notes be adjudged to be usurious and be purged of the usury therein. Such proceedings were afterwards had that in May 1901 judgment was rendered in the trial court in favor of the defendant in this action and against the plaintiff herein and his wife whereby it
858 was held that the said bank could recover the full amount apparently due under said notes. From this judgment the present plaintiff appealed and this court in the case of First National Bank vs. McCarthy, 18 S. D. 218, modified the judgment of the trial court, holding that under said evidence it appeared that the said indebtedness evidenced by the notes sued upon was usurious in all sums exceeding the original $4,000 and ordered that judgment be entered for said $4,000 together with certain sums which the bank had paid for and on account of taxes on the land described in the mortgage. Judgment in conformity with the opinion of this court having been entered, it was alleged in the complaint in this action that on January 21st, 1905, the plaintiff paid to the Clerk of the Circuit Court the said judgment in full, and on said day said judgment was duly satisfied and discharged of record. This action was commenced January 25th, 1905. Prior to the trial below, upon motion of the defendant, the paragraph relating to the payment of said judgment was stricken out, and upon trial the plaintiff sought to offer proof of the fact of the payment of such judgment, which proof was rejected, and also asked to have the allegations concerning payment of the said judgment reinstated in the complaint so that proof of the same might be received and this request to amend was refused. It is the theory of the plaintiff and appellant that inasmuch as the total amount of payments prior to the rendition of the judgment above referred to did not amount to the original loan of $4,000, that until such judgment was paid no cause of action arose in plaintiff's favor against the defendant for the penalties provided by section 5198 above referred to. It is the theory and claim of the defense that at the time any payment was made by plaintiff on any of said notes as interest and so appropriated and applied by the
859 defendant that immediately a cause of action for the penalty provided by said section 5198 accrued, and that the statute

of limitations provided by said section commenced to run. In fact in their briefs both parties admitted, there being no dispute as to the facts, the sole question was whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of section 5198 of the Revised Statutes of the United States. The Revised Statutes of the United States provide:

SECTION 5197. "Any association may take, receive, reserve and charge on any loan or discount made or upon any note, bill of exchange, or other evidence of debt interest at the rate allowed by the laws of the state, territory or district where the bank is located and no more * * *."

SECTION 5198. "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceeding section when knowingly done shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid or his legal representatives may recover back, in an action in the nature of an action on debt, twice the amount of the interest so paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred * * *."

This cause has been very fully briefed on behalf of each party and a large number of authorities have been cited, and the briefs contain extensive quotations from the holdings of the several courts both Federal and State, and while a reading of the two sections of the Federal statute above referred to might not at first
860 awaken any doubt as to the meaning of the several parts thereof, yet a reading of the cases cited apparently presents for consideration an irreconcilable conflict of opinion as to the legal effect to such sections. We believe however, that a thorough study of these cases together with the facts in each case will show, with possibly one or two exceptions, that there is no real conflict upon the construction which should be given to these sections as applied to the facts in this case. In reviewing and analysing many of the decisions, as we shall do herein, it will be found that many of the cases cited in support of appellant's contention are based upon some previous ruling in these or other cases which rulings will be found not to support the position claimed for them. In view of the importance of the question herein involved and the apparent conflict between the opinions of courts of very highest rank we deem ourselves justified in a somewhat extended consideration of this case.

It will be noticed that there are two entirely different parts to section 1598, supra:—The first provides for forfeiture of all interest unpaid when usury has been contracted for and such usury enters into the note or the consideration for such note; second,—Provides for an action to recover as a penalty double all interest paid whenever such interest so paid is in part usurious. The Courts uniformly hold that under the first a debtor can defend against the paying of any

interest, either legal or usurious: while on the other hand if in fact he has made any payment or payments on interest even to the extent of paying usurious interest, he cannot plead such payment either as a credit on the principal or as an offset or counterclaim to the principal, but his only remedy for such usury paid is found in the second part of said section and consists solely in his right in a
861 separate suit brought under the second part of said section to recover the penalty therein provided for; in other words that the common law remedy by a suit or counter-claim for money had and received will not lie.

Schuyler National Bank vs. Gasden, 191 U. S. 451.
Haseltine vs. Central National Bank, 22 Sup. Ct. Rep. 50.
Driesbach vs. Wilkesbarre National Bank, 104 U. S. 52.
Barnet vs. National Bank, 98 U. S. 555.
Farmers' etc. Bank vs. Dearing, 91 U. S. 29.
Walsh vs. Mayer, 111 U. S. 31.
Stephens vs. Monongahela Bank, 111 U. S. 197.

We call particular attention to the above propositions as they seem to us very material upon the construction to be placed on this question of when the statute of limitations begins to run and these holdings will be hereinafter referred to.

The courts also uniformly hold that the including of interest in a renewal note is not a payment of such interest so as to entitle maker to sue for the penalty provided for payment; neither is the deduction of a discount from the amount of the note, taken at the time of giving the note, a payment of such discount so as to authorize a suit for the penalty providing the amount of the discount is usurious.

Brown vs. Marion Nat. Bk., 169 U. S. 416
Driesback vs. Wilsesbarre Nat. Bk., 104 U. S. 52.
Louisville Traction Co. vs. Ky. Nat. Bk., 102 Fed. 442.
McBroom vs. Investment Co., 153 U. S. 318.
Harvy vs. Nat. Life Ins. Co., 60 Vermont 209.
First Nat. Bk. vs. McInturff (Kan.), 43 Pac. 839.

862 These cases are based upon the theory that the mere reserving of a discount or the including of accrued usurious interest in a renewal note, while it may be the "reserving or charging" of usury, it is not the "paying" of same.

Where the authorities divide is upon the question of whether, when the maker of a note has paid money thereon which the payee, with maker's knowledge and consent, has applied in payment of usurious interest, a cause of action at once arises for the penalty provided by section 5198 regardless of whether the principal debt has been paid; or whether on the other hand no such action arises on behalf of the maker of such note until he has made payment thereon in excess of the original debt and legal interest thereon. The respondents take the first position and the appellants the latter, and a determination of this point determines this *casus*. We think that many of the cases upholding the latter position have erred through not making a careful distinction between cases where payments had been made

which payments had been applied upon usurious interest with the knowledge and consent of the debtor, and cases where such application had been made or attempted to have been made by the creditor without the consent of the debtor. A distinction between the two classes of cases will be noted as running throughout many of the decisions hereinafter referred to.

Those cases which uphold the appellant's contention are founded upon the theory that, although the payee may have applied money upon usurious interest, yet no matter how long the indebtedness may have run, and no matter how many such applications there may have been, and no matter how many renewals had been made by the giving of new notes for amounts greater than would be due if only
863 legal interest had been charged on the prior notes, during all this time which may extend one or even ten years, the doctrine of locus penitentiae will be held to apply on behalf of the payee up to such time as he takes a payment which with all other payments received exceeds the amount of the original debt and legal interest, the courts holding that up to that time the payee had an election, that he might repent and reapply all the payments charging only legal interest. The cases supporting respondent's position hold that while the payee after contracting to take, receive or charge an usurious interest has at all times before applying a payment, the benefit of the doctrine of locus penitentiae, yet if he does actually make the application of a payment to the payment of usurious interest, his election as against him is final and he becomes at once liable for the penalty. And furthermore if when such payment is made and applied, such application is with the consent of the debtor, the maker of the note, then, as against his right to action to recover, the statute immediately commences to run.

It is true there are some early cases brought for the recovery of usurious interest under different statutes which have held that an equitable rule should apply, and the debtor should not be entitled to recover a penalty until he has done equity by paying the debt with legal interest in full, but we fail to see wherein any equitable question can arise in this class of cases. These statutes were enacted for the purpose of preventing the taking of usurious interest and to punish the creditor for contracting for the receiving of usury. There certainly is no question of equity, as ordinarily understood, in any statute providing for penalty, forfeiture or punishment. On the other hand, what the debtor is entitled to recover by way of
864 penalty, or to avoid by way of forfeiture, is nothing to which he is equitably entitled, but is based more on the principle underlying the rule of punitive damages. It is not to recover simply what he has suffered but at the same time to punish the creditor for wrong doing. Neither does it seem to us that there is either reason or logic in attempting to apply the rule of locus penitentiae to any case where a party has made an absolute application of money received by him, and continued his business transactions with the party making the payment upon the basis of such application. Of course all laws against usury are based upon the idea that the contracting for or taking of the same is a wrong. It might as well be said that

the embezzler after converting the thing embezzled, or the thief after taking the thing stolen, when the converting and taking had been with criminal intent, still has the locus penitentiae and can purge his soul of the crime. As we have noted above, the courts are unanimous in holding that under this statute, the maker of a note when sued thereon cannot plead the payments of usury either as a credit on the note or as a counterclaim or offset, so in the case at bar, when the plaintiffs were sued on the notes herein, they could not plead in any manner as a defense to the principal of said note any part of the large sum which they had paid as interest. Why was this? Because they were payments which had by the act of both parties already been applied on usury. It may well then be asked can these payments be held to have been such payments for one purpose, to-wit:—to prevent the debtor from receiving a credit therefor, while on the other hand the law be allowed to step in and relieve the payee who has made this application and say to him, you have done no wrong for which you can be holden, because perchance the debtor has been unable to pay the debt.

865 In considering any interpretation to be put on the section in question, it is well to bear in mind two other propositions sustained by the courts. The penalty to be recovered is twice all the interest that has been paid, not merely twice the excess which has been paid above legal interest.

First Nat. Bk. vs. Watt, 22 Sup. Ct. Rep. 457.
Louisville Trust Co. vs. Ken. Nat. Bk. 87 Fed. 143.

The action for the penalty can only be brought by the party who made the payment or by his representatives.

Lealos vs. Union Nat. Bk. (N. D.) 81 N. W. 56.

Let us consider briefly the results which might flow from the enforcement of the rule contended for by the appellants. A party giving a note makes numerous payments which have been applied upon usurious interest with his consent. This note is secured on real estate. He sells the land and the purchaser assumes the indebtedness and then pays the note. Who would have a right to recover for the penalty? A debtor and creditor, having had usurious dealings for several years, reach and adjustment of the balance which they consider should be paid by the debtor and which balance could only be reached by crediting some other previous payment upon usurious interest. A new note is given upon this settlement which new note draws legal interest. The debtor pays this conventional interest for more than two years but no part of the principal. The conventional interest is the extreme legal interest allowed by statute. The debtor sues to recover the penalty provided by the Federal Statute. Under appellants' contention he cannot recover, but while the result reached is just and right the reason upon which the same is based is not because whatever wrong has been done by the

866 creditor is barred by the statute, but rather upon the ground that the creditor has yet a chance to repent of the wrong done years before; and the appellants would hold that if on repenting he

afterwards receives the principal of this new note he will render himself liable to an action for the penalty; though perchance, if at the time he took the usury, he had stolen debtor's horse or committed any other crime except murder, not only the limitations as to time for criminal prosecutions would have run, but the regular six years' statute fixing the time within which actions for damages might be brought may have run. A party gives a note under exactly the same conditions as last above mentioned and after paying conventional interest for one or more years to his creditor, a National Bank, such bank then assigns the note to a party, not a National Bank, and the debtor continues to pay the conventional rate of interest but no part of the principal. Under appellant's theory no recovery could be had. Neither could there be under respondent's theory. But suppose debtor finally pays the principal, then under appellant's theory, if the note had not been assigned, the payee would be liable for the penalty. Under the facts as stated where there had been an assignment of the note who would be liable? Instead of the above case where a settlement had been attempted to be made so that the new contract should be fair and without usury, take a case where a note is given for $1,000 and $100 discount is deducted, $900 being paid to the debtor, and such note drawing twelve per cent interest. Here we have usury in the new contract. Then letting the facts as to the payment of interest and principal and as to the assignment of the note be as in the illustrations above given, it will be found that the results will be exactly
867 the same on appellant's theory while the moral wrong is entirely different, but under respondents' theory the remedy would in each case fit the wrong. Suppose a case where the note is given for the exact amount loaned but the note provides for a usurious rate of interest, such interest is paid from year to year with the knowledge and consent of the debtor and settlement made on that basis but such payments never amounted to the principal of the note. This is practically the case at bar except that we will suppose the payments of interest as made were part at least within two years of the time debtor seeks to recover. The debtor, under appellant's theory cannot recover and there will never come a time within which he can recover unless he shall pay enough to amount to the principal together with perhaps hundreds of dollars of legal interest. He has absolutely no remedy against the party who has crushed him but who still perchance holds a debt against him as large as the original loan, but if he can raise enough money to pay even one dollar more, and this, with what he did pay before, should exceed such principal and legal interest, then immediately he shall have a cause of action, not for this excess over the principal and legal interest, which in this case would be less than a dollar, but for twice all the interest he has ever paid, no matter whether for two or twenty years in the past, which penalty might amount to more than the principal of the debt.

Many further illustrations might be given but the above we think are sufficient to show not only the injustice of appellant's position but the unsoundness from a legal point of view.

Nevertheless there are authorities that apparently hold squarely to the theory contended for by appellants, and other authorities which have been so construed by some courts and are so con-
868 strued by the appellants. We will call attention to each and every one of the cases cited by appellant. An examination of the four cases below will show that neither of them is in any manner in point as sustaining appellant's position.

First Nat. Bk. vs. Childs, 130 Mass 519.
Hall vs. First Nat. Bk. (Neb.) 46 N. W. 151.
Talbot vs. First Nat. Bk., 185 U. S. 172.
Wheaton vs. Hubbard, 20 Johns. 290.

The case of Smith vs. Robinson, 10 Allen 130, was based upon a state statute and was a suit in equity to redeem land from foreclosure. The party seeking to redeem had asked credit for three times the amount of usury included in the fact of the note secured by the mortgage. There was no evidence that this usurious interest had ever in fact been paid. It will thus be seen that that case had no application to the facts in the case at bar where payments had actually been made and by mutual consent applied in settlement of the usurious interest. In Saunders vs. Lampert, 7 Gray 484, there was no application of the money paid to any usurious interest. Stevens vs. Lincoln, 7 Met. 525, merely decided that including usury in the note or check is not a payment of such usury. Harvey vs. Nat. Life Ins. Co., 60 Vt., 209, virtually held that the taking of usury as a discount at the time the note is given is not a payment of usury. Kendall vs. Crouch (Ken.) 11 S. W. 587, was a case in which usury was included in a renewal note and it was held not to be a payment of usury. Cotton States Bldg. Co. vs. Peightol (Texas) 67 S. W. 524, is not a National Bank case and is controlled by rulings of the state court whereby all usurious interest is applied on principal and the penalty is only imposed where amount paid exceeds principal and interest. Louisville Trust Co. vs. Ken-
869 tucky National Bank, 87 Federal 143 holds the same as Kendall vs. Crouch, supra, and this holding is approved in the same case in 102 Federal 442 in which case the court hold flatly with the contention of respondent herein. After reciting the facts which are very similar to the facts in this case, wherein it is shown that there had been a long course of usurious transactions between the parties, and which at last finally culminated in the giving of $30,000 in settlement, and after referring to the statutes of Kentucky under which the court held the money which had been paid prior to the giving of this note, would have necessarily been applied on the interest even if usurious, the court says: "All interest, whether excessive or otherwise, which had been charged by the defendant up to the giving of that note, under the stress of the statutory provisions last referred to, must probably be considered as having been 'extinguished' by the payment made, and, if this be so, the statute of limitations as to this phase of the case began to run as of that date, which was more than two years before this action was brought. But apart from the provisions of the Kentucky statute just quoted,

and whatever weight it may be entitled to, it would be difficult either to reach or to sustain any other conclusion than that it was intended, alike by the defendant and by Thomas & Son, that everything, including interest, usury, as such, and a large amount of the principal, was settled at that date, except the $30,000 note then given. Thomas & Son were always in need of money. They borrowed it. They voluntarily paid the excessive interest. They manifested no election to reclaim it at the time of the settlement of July 8, 1893, and no other conclusion could be fair than that it was meant
870 upon that occasion to extinquish every obligation of the defendant and of Thomas & Son respectively, except that of the latter to pay to the bank $30,000, as provided for in the note of that date."

The case of First National Bank vs. McInturff (Kan.) 43 Pac. 839 holds directly with the appellant in this case and bases its holding not upon the doctrine of locus penitentiæ, but the court says:— "It is contended by the defendant in error that the record discloses that the bank treated each of the renewal notes as a payment of the note formerly given, and that, therefore, he was entitled to recover upon each of said notes so treated by the bank as having been paid. This position is not well taken. Each of the notes given after the maturity of the original note of this series was simply a renewal, and was so treated by all parties. Any payment which may have been made upon either the original or either of the renewals of this series would, in an action brought upon said note, be credited as payment upon the principal sum, all interest being forfeited in the event that it was shown that the transaction was tainted with usury. But a cause of action would not arise for the penalty prescribed by statute until a sufficient amount had been paid to cover the principal sum represented by said series of notes. Bank v. Turner, (Kan. App.) 42 Pac. 936." There is no other discussion as to the reason for this holding, and upon examination of the case cited, 42 Pac. 936, there is the bare holding that the statute does not run until principle debt is paid. There is no discussion whatever as to the reasons for this holding and the only authority cited in support is the case of
871 Bank vs. Grimes, also a Kansas case found in 30 Pac. 474.

Upon an examination of Bank vs. Grimes, it will be found that the only question involved in the determination of that case, was whether the following charge of the trial court to the jury was correct: "If you should find from the evidence in this case that the original note was renewed from time to time without making a new and separate contract, and that usurious interest was embraced in such renewal notes, then you are instructed that the mere renewal of the original note would not purge the transaction of usury in the original note." This instruction was certainly correct law and in no way inconsistent with respondent's contention in this case. We therefore find upon analysis that the Kansas cases have neither weight in reasoning nor from the authorities which they cite. In passing we would state that this case of Bank vs. Grimes refers extensively to the case of Driesbach vs. Bank, supra, as holding that the penalty provided for the taking of usury cannot extinguish or

effect the principal, but that the remedy for same must be enforced as the statute prescribed. As we have before noted this is the uniform holding of the courts, and it is readily seen that it is entirely inconsistent with the theory, that regardless of the acts of the parties the courts can apply all payments to legal interest and principal, although the parties have agreed upon a usurious interest. If in any case the court, regardless of the acts of the parties, has a right to so apply the payments, then it should apply them at all times, in that manner crediting all payments above legal interest upon the principal of the note wherever the facts are as in the Driesbach case.

872 Appellant cites the case of McBroom vs. Investment Company, (N. M.) 30 Pac. 859, as well as the same case in 153 U. S. 318, and inasmuch as it is the different constructions put upon this last case which have led to the apparent doubt as to what the law of the Federal courts is, it is well to consider the same to some length. In the territorial court the statement of facts shows that a loan was made and note given for $65,000, but a discount of $6,500 was taken out and the balance paid over to the maker of the note. The real question involved in this case was whether or not the reservation of such $6,500 was a payment of usury when so reserved, under which the maker of the note could sue and recover penalty provided by the statutes of the territory. It appears that such statutes provided as a penalty, the recovery of three times the excess of the money paid over the legal interest. It will thus be seen that the real question involved in the case at bar was not to be found in the McBroom case. There can be no question under the authorities that the reservation of this discount did not amount to a payment, but the trouble which has arisen over this case is from the fact that the court went into a long review of the history of the laws against usury, referring to the doctrine of locus penitentiæ, and concluding that there can be no recovery of penalty until more than the principal and legal interest have been paid, although as is readily seen this question was in no manner before the court, and that therefore what was said by the court on that point was mere obiter dictum in the McBroom case. In this case, both in the territorial and

873 Federal courts, there will be found cited as authority the following cases.

Stevens vs. Lincoln, supra.
Saunders vs. Lamber, supra.
Harvey vs. Insurance Co., supra.
Hall vs. Bank, supra.
Brown vs. Bank, 72 Pa. St. 209.
Kearney vs. Bk., 18 Atl. 598 (Pa.).
Neale vs. Rouse (Ky.) 19 S. W. 171.

We have already reviewed the first three cases above mentioned, and as regards the others we can only say, that if there is anything in any one of them, that seems capable of such a construction as would uphold the dictum in the McBroom case, it will be found that every one of such cases, if susceptible of such construction, has been

reversed by the later decisions of the same courts holding flatly with the respondent herein.

First Nat. Bank vs. Smith, (Neb.) 54 N. W. 255.
Bank vs. Overholt, 96 Pa. St. 327.
Louisville etc. vs. Nat. Bank, 102 Fed. 442.
Second Nat. Bank vs. Fitzpatrick, 63 S. W. 459.

It will thus be seen that there is no support in the authorities cited for the obiter dictum found in the McBroom case in both courts. In the Federal court, in the McBroom case, the court cites the case of Wright vs. Laing, 3 Barn. & C. 165-168, and it would seem that a careful consideration of this authority, accepting its reasoning as sound, would be sufficient to destroy the contention of appellant, even if in the McBroom decision there can be found anything which would indicate that the court rendering it would have held
874 with the appellant under the facts in this case. The following is from such quotation: "None of the payments were appropriated by either party at the time of payment. If the law ought now to make such an appropriation as the pleader has supposed in this court, the count will be sustained by the proof; otherwise not." * * * "Because peradventure the lender might repent the illegal bargain, and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest." These two quotations contain exactly the legal propositions contended for by respondent herein as we understand their position. We can not therefore see wherein it can be claimed that the McBroom case in any way supports the appellant.

The case of Haseltine vs. Central Nat. Bank, (Mo.) 56 S. W. 895, holds directly with the appellant but bases its holding solely upon the interpretation which it claims the United States Supreme Court had put upon the statute in the McBroom case, and the court also claims that in their view the case of Brown vs. Bank, to which we will hereafter refer, is in no manner conflicting with their interpretation of the McBroom case, and it concludes by saying that its consideration of the statute is based upon the position taken by courts of equity under the statute of 12 Anne.

In the case of First National Bank vs. Denson, (Ala.) 22 So. 518, we have facts exactly similar to those in the case at bar and the court holds flatly with the appellant. This case also cites for its
875 authority the McBroom case and the case of Duncan vs. First National Bank, 8 Fed. 11, to which latter case we do not have access and cannot ascertain the facts therein except as they appear in the quotation from the judge's charge found in appellant's brief. From this quotation it would appear that the legal proposition laid down is as contended for by appellants, but it does not appear that the facts were such as to require the court to go to the extent it did. The only usurious transaction clearly shown to have occurred over two years before the action was brought, was the reserving of a dis-

count when the loan was originally made, which we have already seen was not a payment of usury. The facts as stated do not show whether or not there was any payment of usury more than two years before such action was brought.

We have now reviewed every authority cited by the appellants and we think that an analysis of the same will show either a decision given when the matter passed upon was not in issue, or else a decision which was based upon some other authority that does not support the position taken by the court citing same.

We will now consider the cases in support of the respondent's position. First of these, the case of Brown vs. Marion National Bank, 169 U. S. Rep. S. C. 416, in which the decision was rendered by Justice Harlan who also wrote the decision in the McBroom case. This case of Brown vs. Bank, we find frequently referred to, and the courts seem in great conflict as to what Justice Harlan meant by what he said. It would seem that there is no chance for quibble.

In one place he says: "The words, 'in case the greater rate of
876 interest has been paid,' in section 5198, refer to interest actually paid as distinguished from interest included in the note and only 'agreed to be paid.' If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower—each renewal note including past interest, legal and usurious—the sum included in the last note, in excess of the sum originally loaned, would be interest which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid. It is difficult to tell from the record when there were actual payments of usurious interest as such. Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note." "If at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

From the above quotation it seems clear that Justice Harlan could not have had in mind the fact that the statute of limitations would not commence to run until more than the principle debt had been paid, and that he did have in mind the fact that there was such a thing as the payment of interest which would become a payment for all purposes including the creating of a cause of action in favor of the debtor and which would start the running of the statute.

In the case of Smith vs. First National Bank, 75 N. Y.,
877 Supp. 131, the court says: "The confusion which has arisen over the question as to when the statute of limitations commences to run upon payments of excessive interest in contravention of the section referred to, is attributable in a large measure in failing to distinguish between an actual payment and one that is carried along with the principal indebtedness." It then refers to the McBroom case and analyses it much as we have above, showing that the question before them was not in the McBroom case; that that was

a case of money paid by the plaintiff, and in referring to the facts in the case before them, the New York Court Says: "When the payment of interest or discount was made, that transaction was completed, and the defendant had no election after that to apply this in reduction of the note. That principle only applies where the discount is added to the note." And the New York case refers to the case of Brown vs. Bank, supra, stating that Justice Harlan in such case recognized the distinction that they have made, and shows that to be true by quoting from the Brown case the two quotations we have given above.

In the case of Lynch vs. Merchants' National Bank, (W. Va.) 46 Am. Rep. 520, the court quotes an instruction that was asked for by the defendant in the trial court and states that the following was the correct rule of law: "If the jury believe from the evidence that a greater rate of interest than the rate of six per centum per annum was paid by the plaintiff to the defendant on the several loans described in the declaration, and that such greater rate of interest was knowingly received by the defendant upon such loans and discounts, the plaintiff in this action is entitled to recover
878 twice the amount of such interest so paid by the plaintiff to the defendant within two years prior to the commencement of this suit. The jury cannot find for the plaintiff the amount of any interest, or twice the amount of any interest which was not so paid within two years from the bringing of this suit upon the notes or renewals executed more than two years prior to the bringing of this suit.

In the case of Monongahela National Bank vs. Overholt, 96 Pa. St. 327, the court says: "Upon the actual payment by the borrower and receipt of the illegal interest by the bank, the right of action accrues, and can be maintained, whether the debt has been paid or not. This cannot be more clearly expressed than in the words of the statute, and decisions under other statutes, having little similarity to this, do not warrant departure from the plain meaning of the remedial and punitory provision." And again the court says in speaking of the remedy of the debtor: "He may recover back twice the amount of interest thus paid by action in the nature of debt, and this is akin to double, or treble damages for injuries, allowed by certain statutes for the twofold purpose of compensation and example."

In Lebanon National Bank vs. Karmany, 98 Pa. St. 65, the court in referring to the question of election or what we have termed the locus penitentiæ say,—"If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest, when sued for the penalty,
879 to chop round and call it a credit on the principal, would vitiate the vindicatory clause of the statute. In such case the taking would amount to nothing more than a contracting to re-

ceive. The statute inflicts twice the penalty for taking that it does for contracting:"

In the case of Citizens' Nat. Bank etc. vs. Forman's Assignee (Ky.), 63 S. W. 454, we have a divided court, four sustaining the majority opinion and three dissenting. In the majority opinion are found these suggestive statements: "There being no appropriation of any part of this payment by the debtor to the payment of interest, as such, the law will not presume an application of it to an illegal and void obligation; nor will it permit the creditor to make such an application." And in construing the Federal decisions this court uses these words:—"In the supreme Court decisions it seems to be recognized that usurious interest may be paid, as such, without the discharge of the entire obligation, including principal and interest, and that, if so paid, a cause of action will then arise for the penalty imposed for the actual taking of interest at the illegal rate." And the court cite Trown vs. Marion Nat. Bank, supra, in support of the above proposition, and further cite the McBroom case in support of the proposition that the creditor alone cannot make an application of payments of interest binding upon the debtor, and in determining the cause before them, which was decided by the Kentucky court on the ground that no cause of action had yet arisen, they based their decision upon the following fact alone. "A careful examination of the evidence in this case shows that none of the payments were appropriated by the debtor to the discharge of the interest."

880 In the dissenting opinion in this same case found at page 757 of 53 S. W., the court in speaking of the fact as shown that payments had been made upon notes and then new notes given in renewal for the balance due, wherein the amount of the new notes showed that usurious interest had been taken out of the payments that had been made, although there was no direct testimony by word of mouth that the debtor and creditor had in words agreed to such application of payments the court say,—"If Forman had walked into the bank on September 4th and said, 'I cannot pay you all of my note, but will pay the interest and all of the principal, except $2,431.66, and for that will execute a new note,' the effect of the transaction would have been just the same; for what is tacitly understood need never be expressed in words, and, where men by their conduct unmistakably say a thing it is unnecessary that they should also go through the idle form of saying it in words. The interest that was included in the original note was charged, but not paid, when that note was given. It was paid, however, when that note was discharged and taken up, and a new note for a smaller amount executed." So in the case at bar when we find the indorsements which appear on the back of the old notes showing the indorsement of interest paid at usurious rates, and these old notes taken up and new notes given in renewal, which new notes were for the amount remaining unpaid after allowing such usurious rates, it is certainly unnecessary to require any further proof, that there was an application of the payments to usurious interest not only by the creditor but also by the debtor. As was so well said by this same court:—"The amount had been charged to Forman's account. It represented the

interest on this money, and, if this was not a payment of interest, how can one ever be shown, unless the debtor puts the money in an envelope and indorses it, 'This money is paid on interest
881 as such.' And again,—"Each usurious transaction is distinct, and must stand or fall alone. The purpose in limiting the action to two years from the time of each separate transaction complained of is to secure a speedy settlement of such matters while the facts are fresh or capable of proof, and to enable the banks to know their liabilities, so that they may intelligently declare dividends and carry on their business. Whether usurious interest has been paid in any transaction is simply a question of fact, to be determined, like other similar questions of fact, according to the real intention of the parties as shown by the evidence. The court is not to follow an abstract principle, and shut its eyes to the facts, when, under the evidence, there can be no difference of opinion as to what the parties actually intended, among men of common intelligence acquainted with the business."

The Kentucky court reiterated their views to the effect that under the authorities there can be such an application of payments of usurious interest by the parties thereto as to create a cause of action, in the case of Second Nat. Bank etc. vs. Firzpartick, 63 S. W. 459.

In the case of Citizens' Nat. Bank etc. vs. Donnell, 72 S. W. 925, the court holds that as against the debtor applications must be made upon the principal debt rather than on the unlawful interest, and that the burden is upon the bank in a case wherein it is contended that payments were applied upon interest to show such application by the parties. In discussing the doctrine of locus penitentiae, after referring at some considerable extent to different cases all of which are cited by the appellant in their brief as supporting their
882 doctrine of this case, they say,—"Any such ruling would be in the face of the express provisions of the statute, and thwart its very purposes. It would be an inducement to national banks to charge usurious interest, and when compelled to sue upon its paper containing usury, and that defense is pleaded, simply say to the debtor, 'We will credit the amount of the usurious interest paid by you on the principal of your debt,' and thereby escape the penalty of the law. Certainly no such consequences were intended by it." This same case was appealed to the United States Supreme Court, opinion being found in 195 U. S. 369, wherein in speaking of this same question of right of election, or as otherwise termed locus penitentiae, the court say,—"We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Stat. §5198, in absolute terms, by then declaring an election to remit the excessive interest." And certainly this proposition should not only apply to an action by a bank to collect on the note, but on the other hand it should also apply in theory against the creditor, whenever he has made an application of payment on usurious interest and suit is brought for the penalty; and should apply also on behalf of the creditor as against the debtor whenever the debtor was a party to such application.

In closing we would cite First Nat. Bank vs. Smith (Neb.), 54 N. W. 254. In this case the plaintiff was contending the same as the plaintiff in the case at bar, that the cause of action did not arise until the principal debt was paid, and the court says:—"If the interpretation for which plaintiff contends should be adopted, then
883 it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid large sums of money as illegal interest on a loan, and is unable to pay the entire debt, is not entitled to the benefit of the section. Such was not the intention of the congress, nor is it the fair and reasonable import of the language of the section."

We are therefore satisfied that under the facts in this case there was a mutual application of many payments in satisfaction of usurious interest; that such mutual application was a usurious transaction as contemplated by the last part of section 5198, which transaction was complete the moment of such mutual application, whether it be at the time the payment was made or at the time of the renewal when such payment was figured on interest; that upon such mutual joint application there arose a situation that does not admit of the doctrine of locus penitentiae, and that therefore there is no election on behalf of either party authorizing them to afterwards insist that the payments be applied to that part of the note which was legal; that for the above reasons the cause of action arises immediately when such mutual application is made and the statute of limitations commences then to run.

The judgment of the Circuit Court and the order denying a new trial are affirmed.

884 And afterwards, to-wit, on the same day Judgment was entered, which said judgment is in words and figures, as follows, to-wit:—

885 File No. 2361.

In the Supreme Court, State of South Dakota, April Term, A. D. 1909.

Present:

Dick Haney, Presiding Judge, Dighton Corson, Chas. S. Whiting, E. G. Smith and J. H. McCoy, Judges of said Court, and the officers thereof.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant and Respondent.

This action coming on to be heard at the April, A. D. 1906 Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral

argument, and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the judgment and order of the Circuit Court, within and for Pennington County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at thirty seven and 25/100 dollars.

By the Court.

[SEAL.]

DICK HANEY,
Presiding Judge.

Attest:

FRANK CRANE, *Clerk,*

By —— ——,
Deputy Clerk.

886 [Endorsed:] Supreme Court, State of South Dakota. Filed May 21, 1909. Frank Crane, Clerk.

887 In the Supreme Court of the United States, October Term 1909.

No. 583.

PATRICK B. McCARTHY, Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant in Error.

Affidavit of Personal Service of Annexed Statements, etc.

UNITED STATES OF AMERICA,
State of South Dakota, County of Pennington, ss:

Robert Burton, being first duly sworn upon his oath, says: That he is a male citizen of the United States over the age of twenty-one years, is a member of the bar of the Supreme Court of the State of South Dakota, and is not a party to or interested in the above entitled case. That on the 2nd day of December, A. D., 1909, at Rapid City in the County of Pennington and State of South Dakota, at the hour of about four o'clock P. M. affiant personally served the annexed statement of the errors on which said plaintiff in error intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, upon A. K. Gardner, Esq., a member of the law firm of Buell & Gardner, an attorney of record of the above named defendant in error, by then and there delivering to and leaving with said A. K. Gardner, personally, true copies of said statements.

ROBERT BURTON.

Subscribed and sworn to before me this 2nd day of December, A. D., 1909.

[Seal Circuit Court, Pennington County, South Dakota.]

[SEAL.] J. S. GANTZ,
Clerk of Circuit Court of Seventh Judicial Circuit of South Dakota within and for Pennington County.

888 In the Supreme Court of the United States, October Term, 1909.

No. 583.

PATRICK B. MCCARTHY, Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant in Error.

Affidavit of Personal Service of Annexed Statements, etc.

UNITED STATES OF AMERICA,
State of South Dakota, County of Pennington, ss:

Robert Burton, being first duly sworn upon his oath, says: That he is a male citizen of the United States over the age of twenty-one years, is a member of the bar of the Supreme Court of the State of South Dakota, and is not a party to or interested in the above entitled case. That on the 2nd day of December, A. D., 1909, at Rapid City, in the County of Pennington and State of South Dakota, at the hour of about four o'clock P. M. affiant personally served the annexed statement of the errors on which said plaintiff in error intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, upon the above named defendant in error, First National Bank of Rapid City, South Dakota, a Corporation, by then and there delivering to and leaving with James Halley, President of said defendant in error, personally, true copies of said statements.

ROBERT BURTON.

Subscribed and sworn to before me this 2nd day of December, A. D., 1909.

[Seal Circuit Court, Pennington County, South Dakota.]

[SEAL.] J. S. GANTZ,
Clerk of Circuit Court of Seventh Judicial Circuit of State of South Dakota within and for Pennington County.

889 In the Supreme Court of the United States, October Term, 1909.

No. 583.

PATRICK B. MCCARTHY, Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant in Error.

Statement of the Parts of the Record Which the Plaintiff in Error Thinks Necessary for the Consideration of the Errors on Which He Intends to Rely.

And now comes Patrick B. McCarthy, plaintiff in error, by his counsel, in the above stated case, and files and serves this statement of the parts of the record which the plaintiff in error thinks necessary for the consideration of the errors on which he intends to rely, and said plaintiff in error hereby requests the Clerk of said Court to cause to be printed the following parts of the record, to-wit:

Writ of error, with proof of service thereof; citation in error, with proof of service thereof; petition for writ of error; assignment of errors; bond on writ of error; order allowing writ of error; clerk's certificate and return to writ of error; the printed abstract filed by said plaintiff in error as appellant in the Supreme Court of South Dakota on his appeal to that court from judgment and order of the circuit court of Pennington County in said State, and containing 341 pages, exclusive of index thereto; the printed brief filed by said plaintiff in error as appellant in the Supreme Court of South Dakota on said appeal; opinion of the Supreme Court of the State of South Dakota, filed on said appeal on May 21, 1909; and judgment of the Supreme Court of the State of South Dakota, filed and entered on said appeal on May 21, 1909, together with the indorsements and filings upon the said several records and papers.

890 Annexed hereto is a statement of the errors on which said plaintiff in error intends to rely.

Dated at Rapid City, South Dakota, this 27th day of November, A. D., 1909.

CHARLES W. BROWN,
JOHN F. SCHRADER,
CLARENCE L. LEWIS,
Attorneys for said Plaintiff in Error.

891 In the Supreme Court of the United States, October Term, 1909.

No. 583.

PATRICK B. McCARTHY, Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, a Corporation, Defendant in Error.

Statement of the Errors on Which Plaintiff in Error Intends to Rely.

And now comes Patrick B. McCarthy, plaintiff in error, by his counsel, in the above stated case, and files this statement of the errors on which he intends to rely, and says that in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. The Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Pennington County in the State of South Dakota, finally dismissing the said action of the plaintiff in error upon the merits, and in holding and adjudging that the cause of action set forth in his complaint in said cause was and is barred under and by virtue of the provisions of § 5198 of the Revised Statutes of the United States, and the said judgment of said Supreme Court of the State of South Dakota depends upon and is based on said decision.

Second. That the said Supreme Court of South Dakota in determining said cause and rendering and entering said judgment affirming the judgment of said Circuit Court of said Pennington County finally dismissing said action upon its merits, erred in this, to-wit: That although the said plaintiff in error in his complaint or declaration in said Circuit Court of said Pennington County, and upon the trial of said cause, as also in his assignment of error in his brief filed in said Supreme Court of the State of South Dakota,
892 specially set up and claimed a right to recover the sum of $7605.48, mentioned in his said complaint, as a penalty under and according to the provisions of said § 5198 of the Revised Statutes of the United States, yet the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of said Pennington County, was against the said right so specially set up and claimed, and the said final judgment of said Supreme Court of South Dakota depends upon and is based on said decision.

Third. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Pennington County, erred in this, to-wit: That although in the pleadings in said cause and upon the trial thereof in said Circuit Court of said Pennington County, and in the Supreme Court of the State of South Dakota, it was contended by the said plaintiff in error, and specially set up and claimed by him in his brief and argument and

in all the proceedings in said cause in said Supreme Court of South Dakota, that under § 5198 of the Revised Statutes of the United States the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore the cause of action does not accrue, until the lender has actually collected or received more than the original debt, yet the said Supreme Court of the State of South Dakota decided against the said contention of the said plaintiff in error, and said judgment depends upon and is based on said decision.

Fourth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said Circuit Court of said Pennington County, erred in this, to-wit: That this action, as appears by the plaintiff's said complaint and by the record of said cause was commenced on the 25th day of January, 1905, in the Circuit Court of Pennington County in the State of South Dakota to recover a penalty of double the sum of $3802.74, to-wit, the sum of
893 $7605.48, under and according to the provisions of § 5198 of the Revised Statutes of the United States, the said sum of $3802.74 being the amount of usurious interest claimed to have been paid by the said plaintiff in error to the said defendant in error, a national banking association organized and existing under the laws of the United States of America; that the said action was tried by a jury in said Circuit Court of said Pennington County, and there being no dispute as to the facts, and it appearing by the undisputed evidence in said cause, and being conceded by the parties thereto, and found by said Supreme Court of the State of South Dakota, as well as said trial court, that the original loan made by said defendant in error to the plaintiff in error and mentioned in said complaint was for $4000 and no more; that final judgment for the principal of said loan was entered in the Circuit Court of said Pennington County on the 12th day of January, 1905, and that the total payments made thereon from the origin of said indebtedness up to the 12th day of January, 1905, the date of the entry of said judgment for the principal of said loan, aggregated $3802.74, and no more, and that the said payments aggregating the said sum of $3802.74 were made as and for usurious interest upon the indebtedness alleged in said complaint; and the sole question presented to said Circuit Court of said Pennington County being whether or not the plaintiff's said cause of action to recover the penalty alleged in his complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States, and the said plaintiff in error contending in said Circuit Court and in said Supreme Court of the State of South Dakota that said cause of action was not so barred, and the said defendant in error contending that the said cause of action was in fact barred by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; and the said defendant in error having at the close of all the testimony in said case moved the said Circuit Court of said Pennington

County for the direction of a verdict in favor of said de-
894 fendant in error and against the plaintiff in error upon all the issues, upon the sole ground that said cause of action of the plaintiff in error alleged in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States:—the said Circuit Court, against the contentions of said plaintiff in error, ruled that his said cause of action alleged in his complaint was in fact barred by said § 5198 of the Revised Statutes of the United States, and sustained the said motion and ordered the said jury to enter a verdict in said action in favor of said defendant in error and against the said plaintiff in error upon all the issues; and thereafter judgment was entered in the said Circuit Court of said Pennington County finally dismissing the said action upon its merits and awarding costs to the said defendant in error; and thereafter a statement of the said case having been duly settled and allowed in the said Circuit Court of said Pennington County, containing all the evidence, rulings, orders and proceedings in said Circuit Court, and said plaintiff in error having duly moved the said Circuit Court to vacate and set aside the said verdict and judgment and to grant a new trial of the said action, and the said motion having been by said Circuit Court overruled and denied, the said plaintiff in error duly perfected an appeal to the Supreme Court of the State of South Dakota from the whole and every part of said judgment and order of said Circuit Court, and upon the said appeal the said Supreme Court on the 21st day of May, 1909, entered its judgment affirming the said judgment of said Circuit Court, and holding and adjudging that the said cause of action of the plaintiff in error set forth in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; and the said judgment of said Supreme Court depends upon and is based on the said decision, no other question having been presented to said Supreme Court for determination on said appeal.

Fifth. The said judgment of the Supreme Court of the State of South Dakota, as well as the judgment of the Circuit Court of said Pennington County, is against law, and contrary to § 5198 of the Revised Statutes of the United States, in the following par-
895 ticulars:

1. It appears by the undisputed evidence in said cause that the cause of action alleged in said complaint accrued within two years next before the commencement of said action, and that the same is not barred by § 5198 of the Revised Statutes of the United States; and there is no evidence that said cause of action did not accrue within two years before the commencement of said action or that the same is barred by said § 5198 of the Revised Statutes of the United States.

2. There is no evidence to support the direction of the said Circuit Court to the jury to return a verdict in said case in favor of the defendant in error and against the said plaintiff in error upon all the issues, or to support the said judgment of said Supreme Court of South Dakota affirming the said ruling, and the said direction of a

verdict and said decision of said Supreme Court of South Dakota are contrary to the evidence and against law and contrary to the provisions of said § 5198 of the Revised Statutes of the United States.

3. It appears by the undisputed evidence that all the facts alleged in said complaint of the plaintiff in error are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in the said Circuit Court of said Pennington County in favor of the said defendant in error and against the said plaintiff in error on the 12th day of January, 1905, and not before; that the total payments at any time made by said plaintiff in error upon the notes and indebtedness alleged in the fifth paragraph of said complaint did not exceed the sum of $4000, the amount of the original loan made by said defendant in error, to said plaintiff in error in August, 1887; that the said cause of action to recover the penalty under the provisions of said § 5198 of the Revised Statutes of the United States did not accrue until the 12th day of January, 1905, and was therefore not barred by the provisions of said § 5198, this action having been duly commenced on the 25th day of January, 1905. And it clearly appears from the evidence that
896 the said plaintiff in error is entitled to judgment against the said defendant in error for the amount claimed in his said complaint; that said plaintiff in error paid to said defendant in error and said defendant in error knowingly accepted and received from said plaintiff in error the usurious interest as in said complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged, and the judgment of said Supreme Court of the State of South Dakota as well as the judgment of the said Circuit Court, should have been in favor of said plaintiff in error and against said defendant in error upon all the issues; and for all the reasons aforesaid the said Circuit Court of said Pennington County erred in withdrawing said case from the jury and in ordering and directing a verdict in favor of said defendant in error and against said plaintiff in error upon all the issues, and the said judgment of said Supreme Court of South Dakota, affirming the said decision, is contrary to said § 5198 of the Revised Statutes of the United States, and the said judgment depends upon and is based on said decision.

Sixth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said Circuit Court, erred in this to-wit: That said Circuit Court of said Pennington County erred in making and entering its order of date February 17, 1905, striking out the sixth paragraph of the complaint as irrelevant and redundant, and the said Supreme Court of the State of South Dakota erred in affirming and approving said decision and ruling, for the reasons that the allegations of said sixth paragraph of said complaint are material to this controversy, and are properly a part of the issues in this action, and that said plaintiff in error was entitled to allege and prove as a part of his case the payment and satisfaction of the judgment in said sixth paragraph referred to as well as the date and amount thereof, and said allegations are competent, relevant, and

material to the issues in this action; that the allegations of said sixth
paragraph are necessary for the full and complete presenta-
897 tion and maintenance of said case of the plaintiff in error,
and the evidence in support thereof; that this action is brought to recover a statutory penalty under §§ 5197 and 5198 of the Revised Statutes of the United States; that the final judgment in the action mentioned and referred to in the fifth paragraph of said complaint was filed and entered on the 12th day of January, 1905, and not before; that the total payments of both principal and interest on the original loan mentioned in said fifth paragraph of the complaint did not equal the sum of $4000.00, the amount of said original loan; that it is and was necessary for the plaintiff in error to show the entry of final judgment upon the said indebtedness and the payment and satisfaction thereof as a condition precedent to the commencement and maintenance of this action; that said § 5198 of the Revised Statutes of the United States prescribes the penalty sued for in this action and controls all questions in regard to the recovery thereof; that the ruling, of the said Circuit Court in striking out the said sixth paragraph of said complaint, as well as the judgment of the said Supreme Court of South Dakota affirming the said ruling, is contrary to the statutes of the United States and particularly to said § 5198; that for the reasons aforesaid the plaintiff in error was entitled to allege and prove as a part of his main case the full payment and satisfaction of the said judgment; that the said plaintiff in error was not entitled to maintain said action without alleging and showing the payment of a sum equal at least to the principal of the loan originally made to him by said defendant in error, and that said cause of action for the recovery of a penalty under said § 5198 would not be complete and could not accrue without an allegation and proof that the plaintiff in error had before this action paid to the defendant in error an amount exceeding said original loan.

Seventh. The said Circuit Court of said Pennington County erred in sustaining the objections of the said defendant in error to the following question propounded to the witness Jacob S. Gantz, upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving the said ruling, to-wit:

898 "Q. You may state to the court and jury the record you
have there with reference to this judgment, found on page 185 of the judgment book of Circuit Court, Pennington County, South Dakota, Book 4?."

And in sustaining the motion of said defendant in error to strike out the following answer thereto, to-wit:

"A. Patrick B. McCarthy, et al, judgment debtor, First National Bank of Rapid City, South Dakota, judgment creditor; amount of judgment, damages and costs, $5951.56; date of judgment, January 12, 1905; when filed, January 12, 1905 at nine o'clock; when docketed, January 21, 1905, 3:30 o'clock; judgment book No. 11, page 350, name of Court, Circuit; Attorneys of judgment creditors, Fred H. Whitfield; Satisfaction of judgment record No. 2, page 11; fully

satisfied January 21, 1905, by payment of $5961.91, J. S. Gantz, Clerk of Courts."

For all the reasons hereinbefore specified, and for the further reasons that whether or not it was necessary for the plaintiff in error to allege in his complaint the payment and satisfaction of said judgment, it was necessary and proper for him to prove said payment and satisfaction; that, as appears by the undisputed evidence herein, the amount of the loan originally made by the defendant in error to the plaintiff in error was $4000.00 and no more; that the total payments of both principal and interest made by said plaintiff in error to said defendant in error before the date of said judgment was less than the amount of said original loan; and that no cause of action to recover a penalty under § 5198 of the Revised Statutes of the United States would be complete or could accrue without proof that the said plaintiff in error had before the commencement thereof paid to the defendant in error an amount exceeding the amount of said original loan. That said objections made by the defendant in error to said question are as follows:

"The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court, and objects to the payment or satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out. The defendant objects for the reasons
899 that the entry is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part is incompetent, irrelevant, and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings."

Which question, answer, objections, motion, ruling and exceptions appear on pages 28 and 29 of appellant's printed abstract in said Supreme Court of the State of South Dakota.

Eighth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the objections of said defendant in error to the following question propounded to the witness Gantz upon his direct examination, and the Supreme Court of South Dakota erred in affirming and approving said ruling, to-wit:

"Q. As Clerk of Courts I will ask you if on the 21st day of January, 1905, you were not paid as Clerk of this Court $5961.91 in satisfaction of this judgment, in full of the judgment, interest and costs to that date?"

Said objections being as follows:

"The defendant objects as calling for a conclusion of the witness, impertinent, and for all the reasons offered to the same evidence,—counsel knowing from the ruling of the court that it is inadmissable."

Which question, objections, ruling and exceptions appear on pages 29 and 30 of appellant's abstract filed in the Supreme Court of South Dakota.

Ninth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the objections of said defendant in error to the following question propounded to the witness Gantz upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving the said ruling, to-wit:

"Q. Mr. Gantz, I notice that in judgment book 4 of Pennington County on page 185, and in the line that has been given to the case of Patrick B. McCarthy, and others, judgment debtor, and
900 First National, Bank of Rapid City, S. D., judgment creditor, that under the head 'Satisfaction, remarks, etc.', page 185, you have just entered 'fully satisfied January 21, 1905, by payment of $5961.91, J. S. Gantz, Clerk of Courts'; I will ask you whether or not you paid that money to the plaintiff?"

To which question the defendant in error objected as cumulative and calling for a conclusion of the witness, and as assuming a fact not in evidence, and as incompetent, irrelevant and immaterial for all the reasons stated in the former objection to the offer of proof relative to the payment of this or any other judgment.

Which question, objections, ruling and exception appear on page 31 of appellant's said abstract.

Tenth. For all the reasons hereinbefore specified and assigned the Circuit Court of said Pennington County erred in sustaining the objections of said defendant in error to the offer of plaintiff in error in evidence of that part of page 185 of judgment book No. 4 of said Circuit Court relating to the said judgment of the First National Bank of Rapid City, South Dakota, vs. Patrick B. McCarthy, et al. as it there appears of record, and the Supreme Court of South Dakota erred in affirming and approving said ruling;—said objections to said record and judgment docket being made upon the ground that the same is cumulative and for all of the reasons above noted to that class of testimony; and which offer, objections, ruling and exception appear on pages 31 and 32 of appellant's said abstract.

Eleventh. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the motion of said defendant in error to strike out that portion of the demand, Ex. 47 *a*., which refers to the payment of the said judgment obtained by said defendant in error against said plaintiff in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling; for which motion no ground or reason was assigned and which motion, ruling and exception appear on page 59 of appellant's said abstract.

901 Twelfth. For all the reasons hereinbefore specified and assigned the said Circuit Court of Pennington County erred in sustaining the objections of said defendant in error to said offer of plaintiff in error in evidence of Ex. 48, being a certified check for $5961.91, made and delivered by the plaintiff in error to Jacob S. Gantz, Clerk of Courts, January 21, 1905, in full payment and satisfaction of said judgment, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling;—the said defendant in error objecting to said offer as a self-serving decla-

ration, and incompetent, immaterial and irrelevant to prove or disprove any of the issues in this case, it being a check, endeavoring to prove a payment which is not pleaded. Which offer, objections, ruling and exceptions appear on page sixty of appellant's said abstract.

Thirteenth. For all the reasons hereinbefore specified and assigned, the said Circuit Court of said Pennington County erred in refusing to give the jury instruction No. 1 requested by said plaintiff in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, which instruction, refusal and exception, appear on pages 61 and 62 of said abstract, and are in words and figures as follows, to-wit:

"In Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. MCCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 1, Requested by Plaintiff.

The court instructs the jury that this action is based upon Section 5198 of the Revised Statutes of the United States, relating to national banks, and that the Statute of Limitations governing this action is the one provided for by said Section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you
902 that the final judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said Section 5198 of the Revised Statutes of the United States, did not accrue and therefore, the Statute of Limitations therein provided did not commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by said Statute of Limitations, and your verdict so far as the said limitation of two years is concerned will be in favor of the plaintiff and against the defendant.

Refused.

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*"

Fourteenth. For all the reasons hereinbefore specified and assigned, the said Circuit Court of said Pennington County erred in refusing to give to the jury instruction No. 2 requested by the

plaintiff in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling,—which instruction, refusal and exception appear on pages 62 and 63 of said abstract, and are in words and figures as follows, to-wit:

"In Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. MCCARTHY, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF RAPID CITY, a Corporation, Defendant.

Instruction No. 2, Requested by Plaintiff.

You are further instructed that the evidence is undisputed that the loan between the plaintiff and bank referred to in the
903 complaint was usurious and that the interest payments made upon the notes signed by P. B. McCarthy and Maggie McCarthy, dated July 22, 1891, and February 17, 1896, and marked Exhibits 43, 45 and 46 were made by the plaintiff himself, and upon his own behalf, and as to all such payments of usurious interest your verdict will be for the plaintiff if you further find that the defendant through its managing officers knowingly accepted, received, and retained the same.

Refused,

LEVI McGEE, *Judge.*

To which ruling and refusal the plaintiff at the time duly and specifically accepted, and at his request this exception is signed and allowed.

LEVI McGEE, *Judge.*"

Fifteenth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the motion of said defendant in error to direct the jury to return a verdict in favor of said defendant in error and against said plaintiff in error upon all the issues, and in instructing and directing the jury to return such verdict and in withdrawing said case from the jury and ordering a verdict for the defendant in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said charge and ruling, and said charge and ruling is contrary to the evidence and contrary to law and especially is contrary to said § 5198 of the Revised Statutes of the United States, and is not sustained by the evidence or by the law for all the reasons hereinbefore specified;—which motion, direction, instruction, and exception appear on pages 64, 65 and 66 of appellant's said abstract.

Sixteenth. For all the reasons hereinbefore specified and assigned the said verdict of said jury and the said judgment of said Circuit Court and the said judgment of the Supreme Court of the State of South Dakota are erroneous and contrary to law and contrary to said

§ 5198 of the Revised Statutes of the United States, and contrary to the evidence and are not sustained by the evidence and should be vacated and set aside, and the said Supreme Court of the
904 State of South Dakota should have reversed the said judgment of said Circuit Court and the said order overruling and denying the said motion of said plaintiff in error for a new trial.

Wherefore, the said plaintiff in error prays that the said judgment and decision of the Supreme Court of the State of South Dakota may be reversed, annulled and altogether held for naught, and that the said plaintiff in error may be restored to all things which he has lost by the action and because of the said judgment and decision.

CHARLES W. BROWN,
JOHN F. SCHRADER,
CLARENCE L. LEWIS,
Attorneys for said Plaintiff in Error.

905 [Endorsed:] (Duplicate Original) with Proof of Due Service. In Supreme Court of United States, October Term, 1909. No. 583. 21809. Patrick B. McCarthy, Plaintiff in Error, vs. First National Bank of Rapid City, South Dakota, Defendant in Error. Statement of the errors on which plaintiff in error intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof. Personal service of the within Statements, by copy, is hereby admitted at Rapid City, S. Dak., this 2nd day of December, 1909, reserving all exceptions, waiving no rights. T. H. Neill, Charles J. Buell, A. K. Gardner, Attorneys for Defendant in Error. Charles W. Brown, Schrader & Lewis, Counsel for Plaintiff in Error.

906 [Endorsed:] File No. 21,809. Supreme Court U. S. October Term, 1909. Term No. 583. Patrick B. McCarthy, Pl'ff in Error, vs. First National Bank of Rapid City, South Dakota. Statement by counsel for plaintiff in error of errors intended to be relied upon and designation of parts of record to be printed, with proof of service of same. Filed December 1, 1909.

Endorsed on cover: File No. 21,809. South Dakota Supreme Court. Term No. 122. Patrick B. McCarthy, plaintiff in error, vs. The First National Bank of Rapid City, South Dakota. Filed September 3d, 1909. File No. 21,809.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 122.

PATRICK B. McCARTHY, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of South Dakota to review a judgment of that court affirming a judgment of the circuit court for Pennington County, South Dakota, which dismissed the plaintiff's action upon its merits. The action was brought in the circuit court to recover double the amount of certain usurious interest paid

by the plaintiff in error, plaintiff and appellant below, to the defendant, a national banking association, and which the plaintiff sought to recover under the second clause of section 5198 Revised Statutes, providing that, "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action in debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred." (Record, pp. 1-33.)

The complaint is in the usual form of a complaint in an action of debt under the cited statute, except that it alleges, with great particularity, the origin and history of the original notes and their various renewals, and the history of the litigation resulting in the indebtedness being finally declared usurious by the Supreme Court of the State. Among other things, the complaint alleges that the original loan made by the defendant to the plaintiff was evidenced by four promissory notes, each for $1,000, dated August 22, 1887, and bearing interest at the rate of eighteen per cent per annum; that such rate of interest was unlawful and usurious under the laws of the then Territory of Dakota, now State of South Dakota; that there were various renewals of said notes until February 17, 1896, when the plaintiff and his wife gave to the defendant two notes in renewal, one for $5,000, due in four months, and the other for $675.50, due in thirty days, bearing interest at twelve per cent per annum, and secured by mortgage upon real property of the plaintiff; that between August 22, 1887, and January 1, 1897, the plaintiff paid to the defendant as interest upon the said original notes and the various renewals thereof sundry sums of money, aggregating $3,802.74, and the defendant knowingly, willfully and corruptly demanded and received the same from the plaintiff as usurious interest, and knowingly, willfully and corruptly applied the

same to the payment of the said corrupt and usurious interest, and endorsed the same on the said several promissory notes as interest received thereon, knowing the said interest so contracted for and demanded and retained as aforesaid, to wit: Interest at the rate of eighteen per cent per annum, to be a greater rate of interest than was allowed as aforesaid by the laws of said Territory and State, and since has knowingly, willfully and usuriously applied and so made use of the said sum of $3,802.74 against the statute of the United States in such case made and provided, to wit: Sections 5197 and 5198 of the Revised Statutes of the United States, and the acts amendatory thereof; that on January 25, 1897, the defendant commenced an action against the plaintiff and his wife in said circuit court for the foreclosure of said mortgage and the recovery of the amount apparently due upon said two notes of February 17, 1896, to which the plaintiff in error and his wife set up a plea of usury, praying a forfeiture of the entire interest which the said notes carried with them, or which had been agreed to be paid thereon; that thereafter such proceedings were had in said action that upon an appeal to the Supreme Court of the State from a judgment of foreclosure entered in said circuit court for the full amount apparently due, the said Supreme Court on June 8, 1904, found and adjudged the said mortgage and notes to be usurious in all sums exceeding the original loan of $4,000, and remanded the said case to the circuit court with directions to that court to enter judgment for the said sum of only $4,000, together with certain taxes theretofore paid by the defendant upon the mortgaged property; and that thereafter on January 12, 1905, judgment was entered accordingly in said circuit court pursuant to the mandate of the State Supreme Court. (Record, pp. 22-23.)

The sixth, seventh, and eighth paragraphs of the complaint are as follows:

"6th. That thereafter, and before this action, to wit: On the 21st day of January, 1905, this plaintiff paid to the clerk of said circuit court for the use of the defendant, the said First National Bank, the full amount of the said judgment, to wit: five thousand nine hundred and sixty-one and 91/100 dollars, and on the same day the said judgment was duly satisfied and discharged of record.

"7th. That before this action this plaintiff duly demanded of the defendant the payment of twice the amount of the usurious interest so paid by him to the defendant, as aforesaid, to wit: seven thousand six hundred and five and 48/100 dollars, as a penalty under the provisions of section 5198 of the Revised Statutes of the United States, which demand was by the defendant, before this action, refused, and that no part of the said interest has been paid back to this plaintiff, and that by reason of the premises the defendant is indebted to the plaintiff in the sum of seven thousand six hundred and five and 48/100 dollars, all of which is now due as aforesaid, and remains wholly unpaid.

"8th. That by reason of the premises, and all the facts above set out, defendant became indebted to this plaintiff in the amount of $7,605.48; whereby an action accrued, according to the provisions of said section 5198 of the Revised Statutes of the United States." (Record, pp. 22-29, 268-278.)

The defendant, by its answer, admitted sundry allegations of the complaint, but the only part of the answer material to the controversy here, or in the Supreme Court of the State, is the fifth defense, which is as follows:

"And for a further and affirmative defense to the complaint, and to the cause of action or causes of action therein set forth, this defendant alleges that the said payments and the said transactions in the complaint mentioned, and which are the basis of the plaintiff's cause of action or causes of action, were not made nor did they occur within two years before the commencement of this action, and the cause or

causes of action set forth in the complaint did not accrue within two years next before the commencement of this action; and said cause or causes of action, and each thereof, is barred by section 5198 of the Revised Statutes of the United States, and the acts amendatory thereof." (Record, pp. 33-35.)

On February 1, 1905, and prior to the calling of the case for trial, the circuit court, upon the motion of the defendant's attorneys, made an order striking out the sixth paragraph of the complaint as irrelevant and redundant; to which order and ruling the plaintiff at the time duly excepted. (Record, pp. 36-37.)

At the trial the plaintiff sought to have paragraph six reinstated in the complaint, and produced the clerk of the trial court as a witness, with his records, and sought and offered to show that the judgment of the trial court in the foreclosure suit, as modified by the Supreme Court of the State, was fully paid by the plaintiff on January 21, 1905, as alleged in the sixth paragraph of the complaint; all of which was refused by the trial court, and proper exceptions taken by the plaintiff. (Record, pp. 37-41.)

The plaintiff at the trial offered in evidence the record in the foreclosure suit mentioned (Record, pp. 70-238), resulting in the opinion and judgment of the State Supreme Court modifying the judgment of the circuit court in that case (Record, pp. 239-246; 18 S. D., 218), and in the final judgment of the circuit court in the foreclosure case as modified by the Supreme Court (Record, pp. 247-250). The plaintiff at the trial also gave evidence tending to prove all the allegations of his complaint (Record, pp. 37-58, 250-259). It was admitted in open court that this action was commenced on January 25, 1905. No evidence was offered or introduced by the defendant at the trial, and thereupon both sides rested and the testimony closed. (Record, p. 58.)

At the proper time the plaintiff asked the trial court to give to the jury the following instruction:

> *"Instruction No. 1 Requested by Plaintiff.*
>
> "The court instructs the jury that this action is based upon section 5198 of the Revised Statutes of the United States, relating to national banks, and that the statute of limitations governing this action is the one provided for by said section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you, that the final judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said section 5198 of the Revised Statutes of the United States, did not accrue and therefore, the Statute of Limitations therein provided did not commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by said Statute of Limitations, and your verdict so far as the said limitation of two years is concerned will be in favor of the plaintiff and against the defendant."

Which request was by the court refused and proper exception taken by the plaintiff. (Record, p. 16.)

Thereupon, and at the proper time, the defendant made the following motion to the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues:

> "Both sides having rested, the defendant at this time moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the following reasons, viz:
>
> "First. The undisputed evidence in this case shows

that the alleged payments of usurious interest were made on or prior to the 10th day of January, 1897, and this action was not commenced until the 25th day of January, 1905, and hence, the said cause or causes of action in the complaint mentioned are barred by the statute of limitations under section 5198 of the Revised Statutes of the United States, and acts amendatory thereof.

"Second. It appears by the undisputed evidence that the alleged payments of usurious interest in the complaint set forth, and constituting plaintiff's cause or causes of action, were all made on or prior to the 1st day of January, 1897, and this action was not commenced until the 25th day of January, 1905, or more than eight years thereafter, and, hence, was not commenced within two years from the time the usurious transactions occurred, and, hence, barred by the statute of limitations under section 5198 of the Revised Statutes of the United States, and acts amendatory thereof.

"Third. The undisputed evidence shows that the payments of usurious transactions in the complaint mentioned, which are the basis of the plaintiff's cause or causes of action, were not made, nor did they occur within two years before the commencement of this action, and, hence, are barred by the statute of limitations under section 5198 of the Revised Statutes of the United States, and act amendatory thereof.

"Fourth. The undisputed evidence shows that the cause or causes of action set forth in the complaint did not accure within two years before the commencement of this action, and said cause or causes of action, and each thereof, are barred by section 5198 of the Revised Statutes of the United States and the acts amendatory thereof." (Record, p. 60.)

The circuit court thereupon granted the said motion and directed the jury to return into court a verdict in favor of the defendant and against the plaintiff upon all the issues, and such verdict was thereupon returned accordingly, as

directed by the court, to which verdict the plaintiff at the time duly excepted. (Record, pp. 60-61.)

And thereupon and before the entry of judgment in the trial court, the plaintiff took and filed exceptions to the said charge and direction, as follows, to wit:

"*Exceptions to Charge of Court.*

"Comes now the above-named plaintiff after the court's instructions to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and before the entry of judgment herein, and excepts to the court's instruction to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the reasons and upon the grounds following, to wit:

"I.

"It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action, and is not barred by section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

"II.

"It appears by the undisputed evidence that the plaintiff's cause of action accrued within two years next before the commencement of this action, and that the same is not barred by the provisions of section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

"III.

"There is no evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action, or that the same is barred by section 5198 of the Revised Statutes of the United States.

"IV.

"There is no evidence to support the said direction of the court to the jury to return a verdict herein in favor of the defendant and against the plaintiff upon all the issues, and the said direction and instruction of the court is contrary to the evidence, and contrary to law and contrary to the provisions of said section 5198 of the Revised Statutes of the United States.

"V.

"It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and against the plaintiff on the 12th day of January, 1905, and not before; and that the total payments at any time made by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in August, 1887; and that the plaintiff's cause of action to recover a penalty under the provisions of said section 5198 of the Revised Statutes of the United States did not accrue until the said 12th day of January, 1905, and was therefore not barred by the provisions of said section 5198.

"VI.

"It clearly appears from the evidence that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the evidence clearly shows that the plaintiff paid to the defendant, and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged, and the verdict should have been

for the plaintiff and against the defendant for the amount claimed in the complaint.

"VII.

"For all the reasons above stated, the court erred not only in giving such instructions, but in withdrawing the case from the jury and ordering a verdict for the defendant herein, and the said charge and ruling of the court is contrary to the evidence and contrary to law, and is not sustained by the evidence.

"CHARLES W. BROWN,
"SCHRADER & LEWIS,
"Plaintiff's Attorneys.

"Which foregoing exceptions of the plaintiff to the court's said ruling and instruction were duly made at the time of the giving of such instruction and are by the court hereby allowed and ordered to be made a part of the record of this case and filed herein, this 31st day of March, A. D. 1905.

"LEVI MCGEE, *Judge.*

"Attest:
"J. S. GANTZ, *Clerk.*"

(Record, pp. 61-63.)

Thereafter, on June 28, 1905, judgment finally dismissing said action upon its merits, and that the defendant recover of the plaintiff the costs and disbursements of this action, was filed and entered in accordance with said verdict; to which judgment the plaintiff at the time duly excepted (Record, pp. 63, 260).

Thereafter the plaintiff, having caused to be settled, in accordance with the State practice, a statement of the case containing all the evidence, proceedings, instructions, objections, and exceptions, and having made his motion for a new trial, which was overruled, perfected an appeal to the Supreme Court of the State from the said judgment and order denying his motion for a new trial, assigning and

arguing the same errors in that court as are relied upon in this court (Record, pp. 63-69, 260-299).

On May 21, 1909, an opinion and judgment was handed down by the Supreme Court of the State affirming the judgment and order of the circuit court (Record, pp. 299-316).

The main questions involved upon this writ of error, and the manner in which they are raised, is thus stated by the Supreme Court of the State in its opinion:

> "WHITING, *J.*:
>
> "This cause comes before this court upon an appeal from the judgment of the circuit court and from the order of said court denying a new trial. The action was one brought by the plaintiff and appellant, Patrick B. McCarthy, against the defendant and respondent, First National Bank of Rapid City, to recover penalties in the sum of $7,605.48, being twice the amount of usurious interest which plaintiff claims he paid to the defendant, and that defendant received in violation of sections 5197 and 5198 of the United States Revised Statutes (U. S. Comp. St., 1901, p. 3493). For the purpose of this appeal, the following facts may be taken as established: In August, 1887, plaintiff loaned of defendant $4,000, evidenced by four promissory notes of $1,000 each, payable three, six, nine, and twelve months after date, with interest on each note at 18 per cent per annum until paid. These notes were extended until August 7, 1888, when a new note in the sum of $4,000 was given by plaintiff, his wife, and one other party. This note was due in 90 days, with interest at 18 per cent per annum. Considerable interest upon this note was paid, but no part of the principal, and on May 22, 1889, a new note was given signed by plaintiff, his wife, and a third party, which said note was for $5,000, due in one year, bearing interest at 12 per cent per annum. Nine hundred dollars was paid and indorsed as interest upon this note, and on July 22, 1891, a new note of $5,000 was given by plaintiff and his wife, the

same due in six months, bearing interest at 12 per cent per annum. This last note was secured by a mortgage upon real estate belonging to the makers. It is admitted that the only consideration for this last note was the original $4,000 loaned to plaintiff, together with certain usurious interest upon such original loan. It is admitted that the plaintiff made a large number of payments dating from February 8, 1892, down to January 2, 1896, upon this note, all of which payments were indorsed upon said note as interest, and upon February 17, 1896, the plaintiff and his wife gave to defendant two notes in renewal, one for $5,000, due in four months, with 12 per cent interest, and the other for $675.50, due in 30 days, with 12 per cent interest; this last note purporting to be interest upon the note of July 22, 1891. Payments as and for interest were made upon the last $5,000 note; the last payment being made on or before January 1, 1897. It is alleged and admitted that the total payments by way of interest and which were by the defendants applied as interest upon the several notes, aggregated the sum of $3,802.74, for twice which the plaintiff brought this action. On January 25, 1897, the defendant in this action commenced an action against the plaintiff and his wife for the foreclosure of the mortgage securing the above-mentioned notes, and to recover the amount due by the terms of said mortgage and notes thereby secured. The plaintiff herein appeared as defendant in said action, set up the facts hereinbefore stated in regard to the usurious interest on the original notes, and prayed that said mortgage and notes be adjudged to be usurious and be purged of the usury therein. Such proceedings were afterwards had that in May, 1901, judgment was rendered in the trial court in favor of the defendant in this action and against the plaintiff herein and his wife, whereby it was held that the said bank could recover the full amount apparently due under said notes. From this judgment the present plaintiff appealed, and this court in the case of First National Bank *vs.* McCarthy, 18 S. D., 218; 100 N. W., 14, modified the judgment of the trial court, holding

that under said evidence it appeared that the said indebtedness evidenced by the notes sued upon was usurious in all sums exceeding the original $4,000, and ordered that judgment be entered for said $4,000, together with certain sums which the bank had paid for, and on account of taxes on the land described in the mortgage. Judgment in conformity with the opinion of this court having been entered, it was alleged in the complaint in this action that on January 21, 1905, the plaintiff paid to the clerk of the circuit court the said judgment in full, and on said day said judgment was duly satisfied and discharged of record. This action was commenced January 25, 1905. Prior to the trial below, upon motion of the defendant, the paragraph relating to the payment of said judgment was stricken out, and upon trial the plaintiff sought to offer proof of the fact of the payment of such judgment, which proof was rejected, and also asked to have the allegations concerning payment of the said judgment reinstated in the complaint, so that proof of the same might be received, and this request to amend was refused. It is the theory of the plaintiff and appellant that, inasmuch as the total amount of payments prior to the rendition of the judgment above referred to did not amount to the original loan of $4,000, until such judgment was paid, no cause of action arose in plaintiff's favor against the defendant for the penalties provided by section 5198 above referred to. It is the theory and claim of the defense that at the time any payment was made by plaintiff on any of said notes as interest and so appropriated and applied by the defendant that immediately a cause of action for the penalty provided by said section 5198 accrued, and that the statute of limitations provided by said section commenced to run. In fact, in their briefs both parties admitted, there being no dispute as to the facts, the sole question was whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of section 5198 of the Revised Statutes of the United States" (Record, pp. 300-302).

The Statutes of Dakota Territory and the State of South Dakota Relating to Usury.

At all times since July 1, 1887, the following statutes relating to usury have been in force and effect as shown by sections 3721, 3722, and 3723 of the Compiled Laws of the Territory of Dakota, A. D. 1887, and by sections 1417, 1418, and 1419 of the Revised Civil Code of the State of South Dakota, approved January 21, 1903, the section references here being to the former compilation, and which are identical with the corresponding sections of the Revised Civil Code:

> "SEC. 3721. 1. The highest rate of interest which it shall be lawful for any person to take, receive, retain, or contract for in this Territory, shall be twelve per cent per annum, and at the same rate for a shorter time.
>
> 2. Unless within the above limitation, there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, after they become due on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him.
>
> "SEC. 3722. The interest which would become due at the end of the term for which a loan is made, not exceeding one year's interest in all, may be deducted from the loan in advance if the parties thus agree.
>
> "SEC. 3723. A person taking, receiving, retaining, or contracting for any higher rate of interest than the rate of twelve per cent per annum, shall forfeit all the interest so taken, received, retained, or contracted for; it being the intent and meaning of this section not to provide a forfeiture of any portion of the principal. When a greater rate of interest has been paid than twelve per cent per annum, the person paying it or his personal representative, may re-

cover the excess from the person taking it, or his personal representative, in an action in the proper court."

Said sections 3721 and 3723 were formerly known as sections 1098 and 1100 of the Civil Code of Dakota Territory.

II.

Specification of Errors Relied Upon by Plaintiff in Error.

The plaintiff in error here and now sets out separately and particularly each error assigned and intended to be urged, and says that in the record and proceedings in this cause there is manifest error in this, to wit:

First. The Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Pennington County, in the State of South Dakota, finally dismissing the said action of the plaintiff in error upon the merits, and in holding and adjudging that the cause of action set forth in his complaint in said cause was and is barred under and by virtue of the provisions of §5198 of the Revised Statutes of the United States, and the said judgment of said Supreme Court of the State of South Dakota depends upon and is based on said decision. (Record, pp. 319, 9.)

Second. That the said Supreme Court of South Dakota in determining said cause and rendering and entering said judgment affirming the judgment of said circuit court of said Pennington county, finally dismissing said action upon its merits, erred in this, to-wit: That although the said plaintiff in error in his complaint or declaration in said Circuit Court of said Pennington county, and upon the trial of said cause, as also in his assignment of error in his behalf filed in said Supreme Court of the State of South Da-

kota, specially set up and claimed a right to recover the sum of $7,605.48, mentioned in his said complaint, as a penalty under and according to the provisions of said §5198 of the Revised Statutes of the United States, yet the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of said Pennington county, was against the said right to specially set up and claim, and the said final judgment of said Supreme Court of South Dakota depends upon and is based on said decision. (Record, pp. 319, 9-10.)

Third. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Pennington county, erred in this, to-wit: That although in the pleadings in said cause and upon the trial thereof in said Circuit Court of said Pennington county, and in the Supreme Court of the State of South Dakota, it was contended by the said plaintiff in error, and specially set up and claimed by him in his brief and argument and in all the proceedings in said cause in said Supreme Court of South Dakota, that under §5198 of the Revised Statutes of the United States the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore the cause of action does not accrue until the lender has actually collected or received more than the original debt, yet the said Supreme Court of the State of South Dakota decided against the said contention of the said plaintiff in error, and said judgment depends upon and is based on said decision. (Record, pp. 319-320, 10.)

Fourth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said Circuit Court of said Pennington county, erred in this, to-wit: That this action, as appears by the plaintiff's said complaint and by the record of said cause was commenced on

the 25th day of January, 1905, in the Circuit Court of Pennington county, in the State of South Dakota to recover a penalty of double the sum of $3,802.74, to-wit, the sum of $7,605.48, under and according to the provisions of §5198 of the Revised Statutes of the United States, the said sum of $3,802.74 being the amount of usurious interest claimed to have been paid by the said plaintiff in error to the said defendant in error, a national banking association organized and existing under the laws of the United States of America; that the said action was tried by a jury in said Circuit Court of said Pennington county, and there being no dispute as to the facts, and it appearing by the undisputed evidence in said cause, and being conceded by the parties thereto, and found by said Supreme Court of the State of South Dakota, as well as said trial court, that the original loan made by said defendant in error to the plaintiff in error and mentioned in said complaint was for $4,000 and no more; that final judgment for the principal of said loan was entered in the Circuit Court of said Pennington county on the 12th day of January, 1905, and that the total payments made thereon from the origin of said indebtedness up to the 12th day of January, 1905, the date of the entry of said judgment for the principal of said loan, aggregated $3,802.74, and no more, and that the said payments aggregating the said sum of $3,802.74 were made as and for usurious interest upon the indebtedness alleged in said complaint; and the sole question presented to the said Circuit Court of said Pennington county being whether or not the plaintiff's said cause of action to recover the penalty alleged in his complaint was and is barred under and by virtue of the provisions of said §5198 of the Revised Statutes of the United States, and the said plaintiff in error contending in said circuit court and in said Supreme Court of the State of South Dakota that said cause of action was not so barred, and the said defendant in error contending that the said cause of action was in fact barred by virtue of the provisions of said §5198 of the Revised Statutes of the United States; and the said defendant

in error having at the close of all the testimony in said case moved the said Circuit Court of said Pennington county for the direction of a verdict in favor of said defendant in error and against the plaintiff in error upon all the issues, upon the sole ground that said cause of action of the plaintiff in error alleged in his said complaint was and is barred under and by virtue of the provisions of said §5198 of the Revised Statutes of the United States: the said circuit court, against the contentions of said plaintiff in error, ruled that his said cause of action alleged in his complaint was in fact barred by said §5198 of the Revised Statutes of the United States, and sustained the said motion and ordered the said jury to enter a verdict in said action in favor of said defendant in error and against the said plaintiff in error upon all the issues; and thereafter judgment was entered in the said Circuit Court of said Pennington county, finally dismissing the said action upon its merits and awarding costs to the said defendant in error; and thereafter a statement of the said case having been duly settled and allowed in the said Circuit Court of said Pennington county, containing all the evidence, rulings, orders and proceedings in said circuit court, and said plaintiff in error having duly moved the said circuit court to vacate and set aside the said verdict and judgment and to grant a new trial of the said action, and the said motion having been by said circuit court overruled and denied, the said plaintiff in error duly perfected an appeal to the Supreme Court of the State of South Dakota from the whole and every part of said judgment and order of said circuit court, and upon the said appeal the said Supreme Court on the 21st day of May, 1909, entered its judgment affirming the said judgment of said circuit court, and holding and adjudging that the said cause of action of the plaintiff in error set forth in his said complaint was and is barred under and by virtue of the provisions of said § 5198 of the Revised Statutes of the United States; and the said judgment of said Supreme Court depends upon and is based on the said decision, no other question having been

presented to said Supreme Court for determination on said appeal (Record, pp. 320-321, 10-11).

The said motion of the defendant in error for the direction of a verdict in favor of the defendant in error and against the plaintiff in error upon all the issues, and the said ruling of said circuit court sustaining the said motion, and the exceptions of the plaintiff in error to said ruling with the proceedings thereon are respectively in words and figures as follows, to wit:

> "Both sides having rested, the defendant at this time moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the following reasons, viz:
>
> "First. The undisputed evidence in this case shows that the alleged payments of usurious interest were made on or prior to the 10th day of January, 1897, and this action was not commenced until the 25th day of January, 1905, and hence, the said cause or causes of action in the complaint mentioned are barred by the statute of limitations under Section 5198 of the Revised Statutes of the United States, and acts amendatory thereof.
>
> "Second. It appears by the undisputed evidence that the alleged payments of usurious interest in the complaint set forth, and constituting plaintiff's cause or causes of action, were all made on or prior to the 1st day of January, 1897, and this action was not commenced until the 25th day of January, 1905, or more than eight years thereafter, and hence, was not commenced within two years from the time the usurious transactions occurred, and hence, barred by the Statute of Limitations under Section 5198 of the Revised Statutes of the United States and acts amendatory thereof.
>
> "Third. The undisputed evidence shows that the payments or usurious transactions in the complaint mentioned, which are the basis of the plaintiff's cause or causes of action, were not made, nor did they occur within two years before the commencement of this action, and hence, are barred by the Statute of Limi-

tations under Section 5198 of the Revised Statutes of the United States and act amendatory thereof.

"Fourth. The undisputed evidence shows that the cause or causes of action set forth in the complaint did not accrue within two years before the commencement of this action, and said cause or causes of action, and each thereof, are barred by Section 5198 of the Revised Statutes of the United States and the acts amendatory thereof" (Record, p. 60).

The circuit court thereupon granted the said motion and directed the jury to return into court a verdict in favor of the defendant and against the plaintiff upon all the issues, and such verdict was thereupon returned accordingly as directed by the court, to which verdict the plaintiff at the time duly excepted (Record, pp. 60-61).

And thereupon and before the entry of judgment in the trial court, the plaintiff took and filed exceptions to the said charge and direction, as follows, to wit:

"Exceptions to Charge of Court.

"Comes now the above named plaintiff after the court's instructions to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, and before the entry of judgment herein, and excepts to the court's instructions to the jury to return a verdict in favor of the defendant and against the plaintiff upon all the issues, for the reasons and upon the grounds following, to wit:

"I.

"It appears by the undisputed evidence that the plaintiff's cause of action alleged in his complaint accrued within two years next before the commencement of this action, and is not barred by Section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

"II.

"It appears by the undisputed evidence that the plaintiff's cause of action accrued within two years

next before the commencement of this action, and that the same is not barred by the provisions of Section 5198 of the Revised Statutes of the United States or by any other statute of limitations.

"III.

"There is no evidence that the plaintiff's cause of action alleged in his complaint did not accrue within two years before the commencement of this action or that the same is barred by Section 5198 of the Revised Statutes of the United States.

"IV.

"There is no evidence to support the said direction of the court to the jury to return a verdict herein in favor of the defendant and against plaintiff upon all the issues, and the said direction and instruction of the court is contrary to the evidence, and contrary to law and contrary to the provisions of said Section 5198 of the Revised Statutes of the United States.

"V.

"It appears by the undisputed evidence that all the facts alleged in paragraph 5 of the complaint are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in this court in favor of the defendant and against the plaintiff on the 12th day of January, 1905, and not before; and that the total payments at any time made by the plaintiff upon the notes and indebtedness alleged in said fifth paragraph of the complaint did not exceed the sum of four thousand dollars, the amount of the original loan made by the defendant to the plaintiff in August, 1887; and that the plaintiff's cause of action to recover a penalty under the provisions of said section 5198 of the Revised Statutes of the United States did not accrue until the said 12th day of January, 1905, and was therefore not barred by the provisions of said section 5198.

"VI.

"It clearly appears from the evidence that the plaintiff is entitled to judgment against the defendant for the amount claimed in his complaint; that the evidence clearly shows that the plaintiff paid to the defendant, and the defendant knowingly accepted and received the usurious interest as in the complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence as in said complaint alleged and the verdict should have been for the plaintiff and against the defendant for the amount claimed in the complaint.

"VII.

"For all the reasons above stated, the court erred not only in giving such instructions, but in withdrawing the case from the jury and ordering a verdict for the defendant herein, and the said charge and ruling of the court is contrary to the evidence and contrary to law, and is not sustained by the evidence.

"CHARLES W. BROWN,
"SCHRADER & LEWIS,
"Plaintiff's Attorneys.

"Which foregoing exceptions of the plaintiff to the court's said ruling and instruction were duly made at the time of the giving of such instruction and are by the court hereby allowed and ordered to be made a part of the record of this case and filed herein, this 31st day of March, A. D. 1905.

"LEVI MCGEE, *Judge.*

"Attest:
"J. S. GANTZ, *Clerk.*"

(Record, pp. 61-63.)

Thereafter, on June 28, 1905, judgment finally dismissing said action upon its merits, and that the defendant recover of the plaintiff the costs and disbursements of this action, was filed and entered in accordance with said ver-

dict; to which judgment the plaintiff at the time duly excepted (Record, pp. 63, 260).

Fifth. The said judgment of the Supreme Court of the State of South Dakota, as well as the judgment of the Circuit Court of said Pennington County, is against law and contrary to section 5198 of the Revised Statutes of the United States in the following particulars:

1. It appears by the undisputed evidence in said cause that the cause of action alleged in said complaint accrued within two years next before the commencement of said action, and that the same is not barred by section 5198 of the Revised Statutes of the United States; and there is no evidence that said cause of action did not accrue within two years before the commencement of said action or that the same is barred by said section 5198 of the Revised Statutes of the United States.

2. There is no evidence to support the direction of the said circuit court to the jury to return a verdict in said case in favor of the defendant in error and against the said plaintiff in error upon all the issues, or to support the said judgment of said Supreme Court of South Dakota affirming the said ruling, and the said direction of a verdict and said decision of said Supreme Court of South Dakota are contrary to the evidence and against law and contrary to the provisions of said section 5198 of the Revised Statutes of the United States.

3. It appears by the undisputed evidence that all the facts alleged in said complaint of the plaintiff in error are true as therein alleged, and that final judgment upon the notes and indebtedness alleged in the complaint was entered in the said Circuit Court of said Pennington County in favor of the said defendant in error and against the said plaintiff in error on the 12th day of January, 1905, and not before; that the total payments at any time made by said plaintiff in error upon the notes and indebtedness al-

leged in the fifth paragraph of said complaint did not exceed the sum of $4,000, the amount of the original loan made by said defendant in error to said plaintiff in error in August, 1887; that the said cause of action to recover the penalty under the provisions of said section 5198 of the Revised Statutes of the United States did not accrue until the 12th day of January, 1905, and was therefore not barred by the provisions of said section 5198, this action having been duly commenced on the 25th day of January, 1905. And it clearly appears from the evidence that the said plaintiff in error is entitled to judgment against the said defendant in error for the amount claimed in his said complaint; that said plaintiff in error paid to said defendant in error and said defendant in error knowingly accepted and received from said plaintiff in error the usurious interest as in said complaint alleged, and that every allegation and issue made by the complaint and denied by the answer is fully established by the evidence, as in said complaint alleged, and the judgment of said Supreme Court of the State of South Dakota, as well as the judgment of the said circuit court, should have been in favor of said plaintiff in error and against said defendant in error upon all the issues; and for all the reasons aforesaid the said Circuit Court of said Pennington County erred in withdrawing said case from the jury and in ordering and directing a verdict in favor of said defendant in error and against said plaintiff in error upon all the issues, and the said judgment of said Supreme Court of South Dakota, affirming the said decision, is contrary to said section 5198 of the Revised Statutes of the United States, and the said judgment depends upon and is based on said decision (Record, pp. 321-322, 11-12).

Sixth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of said circuit court, erred in this, to wit: That said Circuit Court of said Pennington erred in making and entering its order

of date February 17, 1905, striking out the sixth paragraph of the complaint as irrelevant and redundant, and the said Supreme Court of the State of South Dakota erred in affirming and approving said decision and ruling, for the reasons that the allegations of said sixth paragraph of said complaint are material to this controversy, and are properly a part of the issues in this action, and that said plaintiff in error was entitled to allege and prove as a part of this case the payment and satisfaction of the judgment in said sixth paragraph referred to as well as the date and amount thereof, and said allegations are competent, relevant, and material to the issues in this action; that the allegations of said sixth paragraph are necessary for the full and complete presentation and maintenance of said case of the plaintiff in error, and the evidence in support thereof; that this action is brought to recover a statutory penalty under sections 5197 and 5198 of the Revised Statutes of the United States; that the final judgment in the action mentioned and referred to in the fifth paragraph of said complaint was filed and entered on the 12th day of January, 1905, and not before; that the total payments of both principal and interest on the original loan mentioned in said fifth paragraph of the complaint did not equal the sum of $4,000, the amount of said original loan; that it is and was necessary for the plaintiff in error to show the entry of final judgment upon the said indebtedness and the payment and satisfaction thereof as a condition precedent to the commencement and maintenance of this action; that said section 5198 of the Revised Statutes of the United States prescribes the penalty sued for in this action and controls all questions in regard to the recovery thereof; that the ruling of the said circuit court in striking out the said sixth paragraph of said complaint, as well as the judgment of the said Supreme Court of South Dakota, affirming the said ruling, is contrary to the statutes of the United States, and particularly to said section 5198; that for the reasons aforesaid the plaintiff in error

was entitled to allege and prove as a part of his main case the full payment and satisfaction of the said judgment; that the said plaintiff in error was not entitled to maintain said action without alleging and showing the payment of a sum equal at least to the principal of the loan originally made to him by said defendant in error, and that said cause of action for the recovery of a penalty under said section 5198 would not be complete and could not accrue without an allegation and proof that the plaintiff in error had before this action paid to the defendant in error an amount exceeding said original loan (Record, pp. 32-232, 12-13). The said sixth paragraph of the complaint so stricken out as irrelevant and redundant by said order of February 17, 1905, is in words and figures as follows, to wit:

> "That thereafter and before this action, to wit: On the 21st day of January, 1905, this plaintiff paid to the clerk of said circuit court, for the use of the defendant, the said First National Bank, the full amount of the said judgment, to wit: Five thousand nine hundred and sixty-one and 91/100 dollars, and on the same day the said judgment was duly satisfied and discharged of record" (Record, pp. 28, 36-37).

Seventh. The said Circuit Court of Pennington County erred in sustaining the objections of the said defendant in error to the following question propounded to the witness Jacob S. Gantz, upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving the said ruling, to wit:

> "Q. You may state to the court and jury the record you have there with reference to this judgment, found on page 185 of the judgment book of Circuit Court, Pennington County, South Dakota, book 4?"

And in sustaining the motion of said defendant in error to strike out the following answer thereto, to wit:

"A. Patrick B. McCarthy et al., judgment debtor, First National Bank of Rapid City, South Dakota, judgment creditor; amount, of judgment, damages, and costs, $5,951.56; date of judgment, January 12, 1905; when filed, January 12, 1905, at 9 o'clock; when docketed, January 12, 1905, 3.30 o'clock; judgment book No. 11, page 350; name of court, circuit; attorneys of judgment creditors, Fred H. Whitfield; satisfaction of judgment, record No. 2, page 11; fully satisfied January 21, 1905, by payment of $5,961.91. J. S. Gantz, clerk of courts."

For all the reasons hereinbefore specified, and for the further reasons that whether or not it was necessary for the plaintiff in error to allege in his complaint the payment and satisfaction of said judgment, it was necessary and proper for him to prove said payment and satisfaction; that, as appears by the undisputed evidence herein, the amount of the loan originally made by the defendant in error to the plaintiff in error was $4,000, and no more; that the total payments of both principal and interest made by said plaintiff in error to said defendant in error before the date of said judgment was less than the amount of said original loan; and that no cause of action to recover a penalty under section 5198 of the Revised Statutes of the United States would be complete or could accrue without proof that the said plaintiff in error had before the commencement thereof paid to the defendant in error an amount exceeding the amount of said original loan. That said objections made by the defendant in error to said question are as follows:

"The defendant objects to any introduction of any reference to any satisfaction, that issue having been stricken from the pleading by the order of this court, and objects to the payment or satisfaction of the judgment or the introduction of any evidence relating thereto, and moves to strike it out. The defendant objects for the reasons that the entry is secondary evidence, and that any proof of payment or discharge of this judgment in whole or in part

> is incompetent, irrelevant, and immaterial to any of the issues in this case, and contrary to the former ruling of this court in striking from the complaint the sixth paragraph thereof, and proof of the stricken paragraph is wholly irrelevant to any of the issues framed by the pleadings."

Which question, answer, objections, motion, ruling, and exceptions appear on pages 28 and 29 of appellant's printed abstract in said Supreme Court of the State of South Dakota (Record, pp. 323-324, 13-14).

Eighth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the objections of said defendant in error to the following question propounded to the witness Gantz upon his direct examination, and the Supreme Court of South Dakota erred in affirming and approving said ruling, to wit:

> "Q. As clerk of courts I will ask you if on the 21st day of January, 1905, you were not paid as clerk of this court $5,961.91 in satisfaction of this judgment, in full of the judgment, interest and costs to that date?"

Said objection being as follows:

> "The defendant objects as calling for a conclusion of the witness, impertinent, and for all the reasons offered to the same evidence—counsel knowing from the ruling of the court that it is inadmissible."

Which question, objection, ruling and exceptions appear on pages 29 and 30 of appellant's abstract filed in the Supreme Court of South Dakota (Record, pp. 324, 14).

Ninth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington county erred in sustaining the objections of said defendant in error to the following question propounded to the witness Gantz

upon his direct examination, and the Supreme Court of the State of South Dakota erred in affirming and approving the said ruling, to wit:

> "Q. Mr. Gantz, I notice that in Judgment Book 4 of Pennington County on page 185, and in the line that has been given to the case of Patrick B. McCarthy and others, judgment debtor, and First National Bank of Rapid City, S. D., judgment creditor, that under the head 'Satisfaction, remarks, etc.,' page 185, you have just entered 'Fully satisfied January 21, 1905, by payment of $5,961.91, J. S. Gantz, Clerk of Courts'; I will ask you whether or not you paid that money to the plaintiff?"

To which question the defendant in error objected as cumulative and calling for a conclusion of the witness and as assuming a fact not in evidence and as incompetent, irrelevant, and immaterial for all the reasons stated in the former objection to the offer of proof relative to the payment of this or any other judgment.

Which question, objections, ruling and exception appear on page 31 of appellant's said abstract (Record, pp. 325, 14-15).

Tenth. For all the reasons hereinbefore specified and assigned the Circuit Court of said Pennington county erred in sustaining the objections of said defendant in error to the offer of plaintiff in error in evidence of that part of page 185 of Judgment Book No. 4 of said circuit court relating to the said judgment of the First National Bank of Rapid City, South Dakota, *vs.* Patrick B. McCarthy *et al.* as it there appears of record, and the Supreme Court of South Dakota erred in affirming and approving said ruling, said objections to said record and judgment docket being made upon the ground that the same is cumulative and for all of the reasons above noted to that class of testimony, and which offer, objections, ruling and exception appear on pages 31 and 32 of appellant's said abstract (Record, pp. 325, 15).

Eleventh. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington county erred in sustaining the motion of said defendant in error to strike out that portion of the demand, Ex. 47 A, which refers to the payment of the said judgment obtained by said defendant in error against said plaintiff in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, for which motion no ground or reason was assigned and which motion, ruling and exception appear on page 59 of appellant's said abstract (Record, pp. 325, 15).

Twelfth. For all the reasons hereinbefore specified and assigned the said Circuit Court of Pennington County erred in sustaining the objections of said defendant in error to said offer of plaintiff in error in evidence of Ex. 48, being a certified check for $5,961.91, made and delivered by the plaintiff in error to Jacob S. Gantz, clerk of courts, January 21, 1905, in full payment and satisfaction of said judgment, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, the said defendant in error objecting to said offer as a self-serving declaration, and incompetent, immaterial and irrelevant to prove or disprove any of the issues in this case, it being a check endeavoring to prove a payment which is not pleaded; which offer, objections, ruling and exceptions appear on page sixty of appellant's said abstract (Record, pp. 325-326, 15-16).

Said certified check, Ex. 48, is in words and figures (Record, p. 258) as follows:

"No. 49.

"Pennington County Bank.

"Rapid City, S. D., *Jan'y 21st*, 1905.

"Pay to the order of Jacob S. Gantz, Clerk of Courts, $5,961.91. (Five thousand nine hundred and sixty-one 91/100 dollars).

"P. B. McCarthy."

(On the margin of said check is the following:) "International Hotel. P. B. McCarthy, Proprietor." Endorsed on the back of said check is the following: "For the credit of Jacob S. Gantz, Clerk of Courts."

(Stamped on face as follows:)

"Pennington County Bank.

Paid: Jan. 21, 1905, Rapid City, So. Dak."

And

"Good when properly endorsed. $5,961.91.

GEORGE F. SCHNEIDER, *Cashier.*"

Thirteenth. For all the reasons hereinbefore specified and assigned, the said Circuit Court of said Pennington County erred in refusing to give the jury instruction No. 1, requested by said plaintiff in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said ruling, which instruction, refusal and exception appear on pages 61 and 62 of said abstract, and are in words and figures as follows, to wit:

"In Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

"PATRICK B. MCCARTHY, *Plaintiff,*

vs.

"THE FIRST NATIONAL BANK OF RAPID CITY, *a Corporation, Defendant.*

"*Instruction No.* 1, *Requested by Plaintiff.*

"The court instructs the jury that this action is based upon section 5198 of the Revised Statutes of the United States, relating to national banks, and that the Statute of Limitations governing this action is the one provided for by said section 5198, which provides that the action must be commenced within two years from the time the usurious transaction occurred. And the court instructs you that the final

judgment upon the loan made by the bank to the plaintiff, and alleged in the complaint, having been entered in this court on the 21st day of January, 1905, and not before, the plaintiff's cause of action to recover the penalty provided for by said section 5198 of the Revised Statutes of the United States, did not accrue and therefore, the Statute of Limitations therein provided did not commence to run until the said 21st day of January, 1905, and therefore, the plaintiff's right to recover in this case is not barred by said Statute of Limitations, and your verdict so far as the said limitation of two years is concerned will be in favor of the plaintiff and against the defendant.

"Refused.

"LEVI MCGEE, *Judge.*

"To which ruling and refusal the plaintiff at the time duly and specifically excepted, and at his request this exception is signed and allowed.

"LEVI MCGEE, *Judge.*

"LEVI MCGEE, *Judge.*"

Fifteenth. For all the reasons hereinbefore specified and assigned the said Circuit Court of said Pennington County erred in sustaining the motion of said defendant in error to direct the jury to return a verdict in favor of said defendant in error and against said plaintiff in error upon all the issues, and in instructing and directing the jury to return such verdict, and in withdrawing said case from the jury and ordering a verdict for the defendant in error, and the Supreme Court of the State of South Dakota erred in affirming and approving said charge and ruling, and said charge and ruling is contrary to the evidence and contrary to law and especially is contrary to said § 5198 of the Revised Statutes of the United States, and is not sustained by the evidence or by the law for all the reasons hereinbefore specified; which motion, direction, instruction, and exception appear on pages 64, 65 and 66 of appellant's said abstract, and are quoted in full in our foregoing specification of error No. 4 (Record, pp. 327, 17).

Sixteenth. For all the reasons hereinbefore specified and assigned, the said verdict of said jury and the said judgment of said circuit court and the said judgment of the Supreme Court of the State of South Dakota are erroneous and contrary to law and contrary to said § 5198 of the Revised Statutes of the United States, and contrary to the evidence and are not sustained by the evidence and should be vacated and set aside, and the said Supreme Court of the State of South Dakota should have reversed the said judgment of said circuit court and the said order overruling and denying the said motion of said plaintiff in error for a new trial.

Wherefore, the said plaintiff in error prays that the said judgment and decision of the Supreme Court of the State of South Dakota may be reversed, annulled and altogether held for naught, and that the said plaintiff in error may be restored to all things which he has lost by the action and because of the said judgment and decision.

III.

Brief of Argument.

From our foregoing specification of errors, perhaps unnecessarily specific and lengthy, it will be seen that "the sole question" presented to the Supreme Court of the State of South Dakota, as stated by that court on appeal, "was whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of section 5198 of the Revised Statutes of the United States," and that that question arises from and the errors specified relate chiefly to the ruling of the trial court in striking out as irrelevant and redundant the sixth paragraph of the complaint alleging the payment in full of the original loan and judgment, together with the ruling of the trial court in sustaining the motion of the defendant, made upon the sole ground that the plaintiff's cause of action is barred by the Federal Statute of Limitations, for

the direction of a verdict in favor of the defendant and against the plaintiff in error upon all the issues. And we think the following points of law and authorities control the decision of the question so presented.

1.

UNDER SECTION 5198 OF THE REVISED STATUTES OF THE UNITED STATES, THE LIMITATION OF TWO YEARS WITHIN WHICH THE BORROWER MAY SUE FOR DOUBLE THE AMOUNT OF USURIOUS INTEREST COLLECTED AND RECEIVED FROM HIM DOES NOT COMMENCE TO RUN, AND THEREFORE, THE CAUSE OF ACTION DOES NOT ACCRUE UNTIL THE LENDER HAS ACTUALLY COLLECTED OR RECEIVED MORE THAN THE ORIGINAL DEBT.

McBroom vs. Investment Co., 153 U. S., 318.
Investment Co. vs. McBroom (N. M.), 30 Pac., 859.
Duncan vs. First Nat. Bank, 8 Fed. Cases, 11.
First Nat. Bank vs. Denson, 115 Ala., 650, 22 So., 518.
Haseltine vs. Cent. Nat. Bank, 155 Mo., 66, 56 S. W., 895.
First Nat. Bank vs. Childs, 130 Mass., 519.
First Nat. Bank vs. Turner (Kan.), 42 Pac. 936.
First. Nat. Bank vs. McInturff (Kan.), 43 Pac. 839.
Louisville Tr. Co. vs. Ky. Nat. Bank, 102 Fed., 442.
Same vs. Same, 87 Fed., 143.
Harvey vs. Nat. L. Ins. Co., 60 Vt. 209; 14 Atl. 8.
Cotton States Bldg. Co. vs. Peightal, 67 S. W., 524.
Wheaton vs. Hubbard, 20 Johns, 290.
Stevens vs. Lincoln, 7 Met., 525.
Saunders vs. Lampert, 7 Gray, 484.
Smith vs. Robinson, 10 Allen, 132.
Hall vs. First Nat. Bank, 30 Neb., 99; 46 N. W., 151.
Kendall vs. Crouch (Ky.), 11 S. W., 587.
Talbot vs. First Nat. Bank, 185 U. S., 172.
Talbot vs. Sioux Nat. Bank, 185 U. S., 182.

The case of *Duncan vs. First National Bank, supra,* is directly in point, and is also a decision of the very highest authority for the reason that the rule of law there laid down has been followed in other important cases, and was also quoted and approved by the Supreme Court of the United States in the McBroom case; it therefore merits special study and consideration. In that case it was ruled, that national banks which have taken usurious interest may, notwithstanding the giving of successive renewal notes, apply such interest to the principal at any time before the principal is actually paid or judgment is entered for it, and that after such payment, or entry of judgment, the right of action to recover the penalty given by Section 5198 of the U. S. Revised Statutes becomes complete, and the limitation of two years begins to run; and Judge Ketcham in his charge to the jury stated the facts as follows:

> "Gentlemen of the Jury: These are cases brought by the plaintiffs to recover from the defendant the penalty for taking usurious interest under the thirtieth (30th) section of the national bank law of June 3, 1864, (13 Stat. 108). By agreement of counsel both these cases, William Duncan & Brother and Benjamin Millinger, are tried by you together. The plaintiffs, as you have seen in the course of the testimony at different times, loaned money of the defendants, Duncan & Brothers, at three different times; $500 on January 30, 1873, $4,000 on July 9, 1873, and $500 July 18, 1873. Benjamin Millinger loaned $250 January 27, 1873, and $274.35 January 15, 1875. At the time of the loan in each case the bank retained nine per cent as discount and credited the plaintiffs with the balance, taking their notes respectively for the full amount of proceeds and discount. The notes of Duncan & Brothers were not paid at maturity, but were renewed from time to time. The first note of $500, of January 30, 1873, was renewed till the fall of 1874. It had been reduced by payments to the sum of $150. The note of July 9, 1873, for $400, was renewed till October, 1874. The note of July 8, 1873, for $500 was re-

newed till November, 1874. At each renewal nine per cent interest was charged, and was paid by the plaintiffs. These notes were all sued and judgment obtained upon them for the face of the notes or the principal, before the bringing of this suit. The Millinger notes were renewed, the note of January 27, 1873, for $250, from time to time till March, 1874, when it was paid in full; the note of January 15, 1875, for $274.35, was renewed at the end of three months, for two months, and then for one month, and remained unpaid until suit was brought upon it. Judgment was obtained upon it for the full amount and interest from maturity to judgment. Interest was charged at each renewal at nine per cent. No credit was given on the principal of any payment of interest by way of reducing the principal of either of the notes of Millinger or Duncan & Brother. Judgment was entered for the notes in full, independent of interest. And the note that Millinger paid he paid in full without reduction of any payment made of interest. The nine per cent that had been paid and retained was left entirely out of the computation. * * * The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and the judgments on all the Duncan & Brother notes were entered, near the time of bringing these suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run. These actions were brought February 1, 1876; so that they are within the statute. * * * The amount of interest charged in these cases is computed, and is agreed upon by the counsel of both parties as correctly computed. It amounts in the case of Benjamin Millinger to $38.02. In the case of William Duncan & Brother to the sum of $629.91. It is the amount of interest retained and paid upon each of the notes sued by defendants up to the entry of judgment, and upon the note paid by Millinger to the time of the payment. You will find double the amount in each case for the plaintiffs respectively."

And in that case the court laid down the following rule of law, quoted and approved by this court:

> "In case a greater rate of interest has been paid the person by whom it has been paid, or his legal representative, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or recovering the same, provided such action is commenced within two years from the time the usurious transaction occurred. From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgments, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. When payment is actually made, or judgment is entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete."

Our proposition of law is stated in the exact language used by the Supreme Court of the United States in the McBroom case, in which it was held that an action for the recovery of the penalty could not be maintained until at least the principal of the original loan had been paid, and Mr. Justice Harlan, speaking for this court, said:

> "The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere *charging* of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious in-

terest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all payments—collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years, within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest. These conclusions are supported by adjudged cases.

"In *Duncan vs. First Nat. Bank of Mt. Pleasant*, in the District Court of the United States for the Western District of Pennsylvania, it was said: 'From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete.' Nat. Bank cases, 360, 362."

McBroom vs. Investment Co., supra.

That case, it is true, construed the statute of New Mexico, but it will be seen that the question is the same, whether arising under the New Mexico statute, or under the cited

section of the National Bank Act. The language of the New Mexico statute quoted in that case is as follows:

> "And such person, persons or corporation shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators or assigns, double the amount so collected or received, upon any action brought for the recovery of same within three years after such cause of action accrued."

And the language of section 5198, U. S. Revised Statutes, is:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

In the one case the language is: "Within three years after such cause of action accrued." And in the other case the language is: "Within two years from the time the usurious transaction occurred."

Both phrases, we submit, mean exactly the same thing. But the Federal statute forfeits the entire interest, while the New Mexico statute seems to forfeit the excess only above the legal rate. Speaking of the two statutes, the New Mexico supreme court, whose decision was affirmed by the U. S. Supreme Court, said:

> "While the phraseology differs, the two statutes provide for substantially the same thing—the recovery of usurious interest within a given time 'after such action accrued' (the New Mexico statute), or 'from the time the usurious transaction occurred' (the National statute). The construction given to this latter statute is that the limitation runs from the date of the last payment. *Duncan vs. Bank,* 1

Thomp. Nat. Bank Cas., 362; *Brown vs. Bank,* 72 Pa. St., 209; *Kearney vs. Bank* (Pa. Sup.), 18 Atl. Rep., 598; *Harvey vs. Insurance Co.,* 14 Atl. Rep., 8, 9. And, indeed, upon reason as well as upon authority, we think this is the proper construction, if we are to give effect to the contract out of which the usurious transaction grows. If the contract is valid to the extent of the principal and legal interest, there seems to be no sound reason why the borrower should be allowed to recover as a penalty twice the amount of the usury, while he is still indebted to the lender the entire amount of principal and legal interest."

Investment Co. vs. McBroom, 30 Pac., 859.

First National Bank of Gadsden vs. Denson, supra, is on all fours with the case at bar, the facts and the history of the prior litigation being substantially the same, and for clearness of statement and closeness of reasoning there is nothing finer in the adjudged cases than the following from the Alabama Supreme Court, construing section 5198 of the U. S. Revised Statutes:

"The settled construction of the last clause of this statute, in respect of its limitation of the time within which suit to recover back usury paid must be instituted, is that the 'usurious transaction' occurs only when a greater amount than the principal, with legal interest, has been paid, or judgment has been taken for such greater amount; and hence that the time of the limitation does not begin to run until the creditor has received, in the way of payment of principal and usurious interest, a sum in excess of the principal and legal interest, or has taken judgment for such excessive sum. The theory upon which this construction proceeds is that the creditor primarily has an election to repent him of his usurious exaction, which may be made or evidenced by crediting all payments received, whether intended at the time they are made to be of usury or not, on the principal and legal interest; that, so long as he has this *locus penitentiæ*, it is to be assumed that he will avail himself of the right it gives

him to purge the transaction of illegality; and that, of consequence, it cannot be affirmed until the contrary election has been made, by receiving more than the debt and legal interest, or taking judgment therefor, that he has received usurious interest, and until then the 'usurious transaction' has not been consummated, and has not 'occurred,' within the meaning and intent of the statute. Thus, in *Bank vs. Duncan*, Thomp. Nat. Bank Cas., 360, 362; Fed. Cas. No. 4, 135 (an action for usury paid, decided by a Federal district court), it is said: 'From the origin of the loan, from the retaining of the first discount through all the renewals, up to the time of the final payment of the principal, or up to the time of the entering judgment, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made, or judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full, without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and the judgments on the Duncan notes were entered, near the time of bringing these suits, less than two years before. The payment (of the one Millinger note) and the judgment (on the other Millinger and the Duncan notes) concluded the transaction, and determined their character to be usurious. Till that time it was undetermined, and the statute did not begin to run.' This language is quoted with approval by the Supreme Court of the United States in *McBroom vs. Investment Co.*, 153 U. S., 318, 328; 14 Sup. Ct., 852, 856, where a like ruling was made in respect of a statute of New Mexico which was in substance the same as the Federal statute quoted above in the respect under consideration. * * * The debtor obviously has nothing to do with the exercise of the creditor's option. He has no *locus penitentiæ*—no place nor

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time nor opportunity to repent of anything or to ratify anything. His payment of usurious interest, as such, is as clear a manifestation of a confirmation and consummation of the usurious transaction as is possible for him to make, and yet that has no such effect upon it. The institution of an action by him to recover back usurious interest so paid is an equally unequivocal assertion of a consummated usurious transaction, and yet it has no such effect; and his action, as in the McBroom case, *supra*, will go out of court because prematurely instituted, because no cause of action had arisen, unless he shows that such, with other payments, exceed the principal of the loan and legal interest. Nothing, in short, that he can do or forego, can hasten or impede the rounding out of the transaction into a consummated payment of usurious interest, so long as he has not paid more than the debt and legal interest, or in the least clog or facilitate the unfettered election of the creditor to purge the payments of usury by crediting them upon the loan interest. His plea of usury, when sued for a balance of the principal and interest thereon, is no more than an assertion that the contract is tainted with usury. It is much less an affirmation by him that usurious payments have been made than the payments themselves were, or than a suit to recover them back is. Indeed, such plea does not at all assert that usurious payments have been made. That is not the gist of it at all: but its gravamen is that usury was contracted to be paid, and relief upon it, so far from involving an adjudication that usurious interest has been paid, is, to the contrary, an adjudication that no interest has been paid on the particular debt in suit. The interposition of such a plea in a suit on a past-due renewal note for a part of the original loan has no effect upon the right of the creditor plaintiff to apply usurious interest previously paid on the loan, as evidenced by the original or intervening renewal notes, to the principal and legal interest, and thus purge such payments of usury, and forestall the possibility of the transaction, so far as the payments made were concerned, becoming a 'usurious transaction,' within the meaning of the statute. * * * Upon the foregoing considerations, our conclusions

are that plaintiff's action is not barred by the limitation embraced in section 5198, Rev. St., and that his right to maintain it is not affected by the fact that he pleaded usury against the note for a balance of the original loan in the suit upon it by the bank, and upon such plea had judgment forfeiting the interest on that note."

In *Hazeltine vs. Central Nat. Bank, supra,* the facts and the contention of the defendant and appellant, as well as the common-law rule, were thus stated:

"This case is the counterpart of the case of *Bank vs. Hazeltine* (just decided), 55 S. W. 1015. It is an action, under section 5198, Rev. St. U. S., 1878, to recover $831.70, that being double the amount of the usurious interest paid by plaintiffs to the defendant on a note for $2,240, on which the defendant obtained judgment against the plaintiffs in the other case referred to. It is conceded that the plaintiffs paid the defendant the sum of $415.85 to procure extensions of the note for $2,240, from time to time, between October 29, 1894, and June 14, 1896. It is also conceded that such payments were for usurious interest, and that the defendant, in accepting and receiving the usury, has violated the Federal statute. The sole defense is that the party who has paid usurious interest cannot maintain an action under that statute to recover twice the amount so paid, until he has paid the principal sum due, or, at least, unless he tenders the principal; and it is admitted that the plaintiffs have not done this. In support of this contention the defendant relies upon *Wheaton vs. Hibbard*, 20 Johns. 293; *Hawkins vs. Welsh*, 8 Mo., 490; *Rutherford vs. Williams*, 42 Mo., 18; *Livingston vs. Burton*, 43 Mo. App., 272, and *McBroom vs. Investment Co.*, 153 U. S., 318; 14 Sup. Ct., 852; 38 L. Ed., 729. In the New York case it was pointed out that the statute of that State permitted a borrower to recover the excess of interest, over the legal rate paid, in an action of debt, if the suit was begun within one year, and, if the borrower did not sue within such year, then any other person

> could institute such action within the second year, and one-half of the recovery went to the person suing and the other half to the poor of the town in which the offense was committed. It was also shown that at common law, under the statute of 12 Anne, c. 16, 'the party receiving more than the legal rate of interest forfeited the treble value of the moneys or things lent,' to be recovered in an action for money had and received. 'But the party injured cannot recover any part of the principal and legal interest, and, to entitle him to maintain the action, he must show that he has done all that equity requires. *Bacon, Abr. tit. "Usury" (G)*; 1 *Term R., 153.*' And it was held that the statutory remedy did not supersede the common-law remedy, but that the remedies were concurrent. The suit was not brought until more than two years after the offense was committed, and it was held that the action was under the common-law remedy, and that at common law the suit could not be maintained so long as the principal and legal interest remained unpaid, but, as the defendant had not pleaded or proved that it had not been paid, it would be inferred that it had been paid."

And in that case, after quoting at length from the decision of the U. S. Supreme Court in the McBroom case, the Supreme Court of Missouri further said:

> "This must be taken as an authoritative interpretation of the meaning of section 5198, Rev. St. U. S., 1878, and as that is a Federal statute, the construction thereof by the Supreme Court of the United States must be followed by this court. Under the rule there laid down, the plaintiffs herein are not entitled to maintain this action, for there is no allegation or proof that they have paid or offered to pay the debt actually due; that is, the amount actually received by the plaintiffs from the defendant. It is contended, however, by the plaintiffs that the decision of the Supreme Court of the United States in *Brown vs. Bank*, 169 U. S., 416; 18 Sup. Ct., 390; 42 L. Ed., 801, establishes a different rule, and au-

thorizes a recovery in this case. This is a misapprehension. Mr. Justice Harlan delivered the opinion in the McBroom case, and also in the Brown case, and in the Brown case he cites and reaffirms the McBroom case. In the Brown case it did not appear how much of the usurious interest had been paid, and how much was included in the face of the note. It was argued, however, that including it in the face of the note was a payment, but the Supreme Court held that not to be the law. The rule is clearly laid down, however, that, if usurious interest is included in the face of the note, it should in a suit on the note, be credited on the note or eliminated from the note, but no action could be maintained under section 5198 to recover it, because it had not been actually paid, and that only usurious interest actually paid could be recovered under that section. This is all that the Brown case decides. The question whether an action for usurious interest actually paid could be maintained without allegation and proof that the debt itself had been paid, or without an offer to pay it, was not raised, discussed, or passed on in the Brown case, except so far as approving the McBroom case, which so held, may be regarded as an inferential determination of that question; and, so regarded, it cuts off the plaintiffs' right to maintain this action. Thus, it will be seen that the Supreme Court of the United States puts the same construction upon the Federal statute that courts of equity and the courts of law where the statute of 12 Anne is in force, place upon the rights of the borrower and lender; that is, that courts will neither aid the lender to collect usurious interest promised to be paid, nor will they aid the borrower to recover such usurious interest actually paid unless he has paid or offers to pay the amount of money actually received from the lender. The judgment of the circuit court is therefore reversed, and the cause remanded to be proceeded with in accordance herewith. All concur."

And the Missouri court in the same case said that the McBroom case was an action, under the statute of New Mex-

ico, by a borrower to recover double the amount alleged to have been paid by him to the lender as usurious interest, and that "the statute of New Mexico in this regard is very much like the National Bank Act, except that the limitation is three years instead of two."

In *First National Bank of Peterborough vs. Childs, supra*, the rule is thus stated by the Supreme Court of Massachusetts:

> "The statute, in § 5198, provides for the forfeiture of all the interest which the note carries with it, where the bank has taken or reserved or charged a higher rate than the law allows. The maker of the note can avail himself of this provision in defence of an action on the note, and in no other way. *Farmers & Mechanics' Bank vs. Dearing, ubi supra.* The same section provides, further, that if the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the bank taking or receiving the same. This remedy is applicable when the note has been paid, and, ordinarily at least, not till then, and can be availed of only in the form prescribed by the statute, that is to say, by action against the bank."

In *Louisville Trust Company vs. Kentucky Nat. Bank, supra*, the facts were that the plaintiff was the assignee of W. H. Thomas & Son for the benefit of creditors; that Thomas & Son made to the defendant a note for $30,000 on July 8, 1893, and on that date paid the defendant $373.33, as usurious interest or discount; that the plaintiff in April, 1894, paid the note in full with interest, and commenced action on December 13, 1895, for the recovery of the penalty under section 5198, U. S. Revised Statutes. And it was held that the plaintiff was entitled to recover twice the amount of the usurious interest paid on the $30,000 note, including the said sum of $373.33 paid on July

8, 1893, and more than two years before the commencement of the action, the court saying:

> "It is contended that the interest thus paid in separate transactions cannot be the basis of a recovery for double its amount merely because in the previous transactions usurious interest had been charged; that the payment of the usurious interest was an illegal transaction, and stood apart; and that to punish the defendant for taking lawful interest in a separate transaction was not contemplated by Congress in section 5198. But the express decision of the Supreme Court have closed the question. The only illegal charge, it is true, in repsect to the $30,000 note made by the defendant, was in the original discount, which embraced usurious interest, upon that illegal transaction the penalties of the statute must, of course, be visited. In the case of *Brown vs. Bank*, 169 U. S., 416, 18 Sup. Ct, 390, 42 L. ed., 801, and more particularly in that of *McBroom vs. Investment Co.*, 153 U. S., 318, 14 Sup. Ct. 852, 38 L. ed. 729, the Supreme Court holds that double all the interest charged or chargeable on a note under like circumstances should be recovered, whether taken out more than two years before suit was brought or not. These decisions proceed upon the idea that the person receiving the usury may, at any time before the principal of a particular note is paid, repent, and credit it in settlement upon the debt, or treat it as having been paid upon principal, or else refund it outright; and, indeed, the principal has been carried to the extent of being applied where a note which in fact included usury has been renewed. But in this case the $30,000 note did not include any usury, and was never renewed. But for the decisions referred to, it might be possible to hold that what was retained as discount on July 8, 1893, was actually paid on that date, and therefore barred, and that what was paid afterwards was lawful. But they forbid such a ruling. The case before us is not one where, the principal debt being sued for, the interest may be abated because of usury. It is an action to recover

> the penalty of double the interest which 'has been paid' upon the ground that some of it was usurious."
> *Louisville Trust Co. vs. Ky. Nat. Bank,* 102 Fed., 446.

In *First National Bank vs. McInturff, supra,* the Supreme Court of Kansas held that a cause of action would not arise for the penalty prescribed by section 5198 of the U. S. Revised Statutes until a sufficient amount had been paid to cover the principal of the loan, and said:

> "The defendant in error brought his action in the district court of Reno county to recover the penalty provided by sections 5197 and 5198 of the Revised Statutes of the United States for the charging and receiving of certain usurious interest upon the part of the plaintiff in error. From a judgment in favor of the defendant in error the bank brings the case here for review. The facts in this case are practically agreed upon, and the law, in our opinion, is fully established in this State. The petition of the plaintiff below as amended, and upon which the case was tried, alleged a number of separate causes of action, but it is admitted by counsel, and the record discloses, that these various causes of action arise upon three separate and distinct series of notes. That which we may denominate the first series consists of an original note and several renewals, upon which certain payments have been made, but not of a sufficient amount to pay the principal sum of either of the said notes. The payments which were made were in the nature of usurious interest, and the trial court allowed the plaintiff below to recover the penalty prescribed by the statute upon this series of notes. It is contended by the defendant in error that the record discloses that the bank treated each of the renewal notes as a payment of the note formerly given, and that therefore, he was entitled to recover upon each of said notes so treated by the bank as having been paid. This position is not well taken. Each of the notes given after the maturity of the original note of this series was simply a renewal, and was so treated by all parties. Any payment which may have been made

upon either the original or either of the renewals of this series would, in an action brought upon said note, be credited as payment upon the principal sum, all interest being forfeited in the event that it was shown that the transaction was tainted with usury. But a cause of action would not arise for the penalty prescribed by statute until a sufficient amount had been paid to cover the principal sum represented by said series of notes. *Bank vs. Turner* (Kan. App.) 42 Pac. 936. * * * It follows from the views herein expressed that the trial court erred in permitting a recovery upon the first series of notes."

2.

AT COMMON LAW THE BORROWER COULD NOT RECOVER THE PENALTY GIVEN BY THE STATUTES RELATING TO USURY, WITHOUT PAYING OR OFFERING TO PAY AT LEAST THE PRINCIPAL OF THE LOAN, AND THE DECISIONS IN THE DUNCAN AND MC BROOM CASES RESULT FROM THE APPLICATION OF COMMON LAW PRINCIPLES, INCLUDING THE DOCTRINE OF LOCUS PENITENTIAE, TO THE NATIONAL BANK ACT.

Wheaton vs. Hibbard, 20 Johns., 290.
Investment Co. vs. McBroom (N. Mex.), 30 Pac., 859.
Stevens vs. Lincoln, 7 Met., 525.
Saunders vs. Lambert, 7 Gray, 484.
Smith vs. Robinson, 10 Allen, 130.
McBroom vs. Investment Co., supra.
Hazeltine vs. Central Nat. Bank, supra.
First Nat. Bank vs. Denson, supra.

The common law rule is thus stated by Chief Justice Spencer in *Wheaton vs. Hibbard:*

"By the 12 Anne, ch. 16, the party receiving more than the legal rate of interest, forfeited the treble

value of the moneys or other things lent. It is contended that the person who pays above the legal rate of interest is confined to the statute remedy, and that he must not only sue in an action of debt, but that the suit must be within one year, or he is forever precluded. Now, the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed, giving a further remedy, without a negative of the common law remedy, expressed or implied, he may, notwithstanding the statute, have his remedy by action at common law. (1 Com. Dig., Action on Stat., C.) There are no words in the statute, either expressly or impliedly, negativing the common law remedy. The injured party cannot have both remedies, and if he neglects to pursue the statute remedy for more than a year, his right of action at common law would be suspended during the second year, for, peradventure, a third person may prosecute. But, in the present case, the excessive interest was received in 1816 and 1817. It was incumbent on the defendant to show, had the fact been so, that he had been sued within the second year; and not having shown this, the statute remedy is gone. It is undeniable, that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to complete their ruin. In such a case, the maxim of *potior est conditio defendentis* has never been applied. But the party injured cannot recover any part of the principal and legal interest; and to entitle him to maintain the action, he must show that he has done all that equity requires. (Bacon, Usury, G.; 1 T. R., 153.) In this case, had the objection been made that the principal was unpaid, the defendant in error ought to have proved such payment. But the objection was not made; and it seems to me, that when the cause has been litigated on other and different grounds, we are to intend, by the

silence of the plaintiff, in not making the objection, that the fact is, that the principal and interest have been paid. It is a salutary rule, not to suffer an objection to be made when the case comes up for review, which might have been obviated, had it been made at the proper time. The principle is sound, that the court can intend nothing in a special verdict but what is found by the jury. (1 Wils., 55; 1 Cal., 64.) This case I conceive not to be within the rule. The excess beyond legal interest was money to which the plaintiff in error had no right; it belonged to the defendant in error; and he shows a state of facts entitling him to it. Now, what rebuts the justice and equity of his case? What deprives him of his right to regain what has been wrongfully taken from him? The fact that the principal and interest have not been repaid. That, then, is matter of defense to be shown on the other side; and as the negative could not be proved, it would be enough to state the objection, and throw it on the party to prove payment. But when the defense is not made, nor the objection stated, the inference is that the fact did not exist. This is not inferring a fact, but it is rebutting a presumption."

The New Mexico Supreme Court in the McBroom case gives an excellent history of the earlier decisions on usury, and points out that the error of many of them arose from a failure to apply the doctrine of *locus penitentiae*, which later became fully established:

"These and many other cases which might be cited to the same effect hold that, within the meaning of the statute which defines the offense and limits the time within which an action may be brought to recover the penalty, the right of action accrues whenever any money is reserved or received by the lender which is intended at the time of such reservation or reception to be applied in the satisfaction of the usury. This construction cuts off entirely the *locus penitentiae*, and taints the transaction in its very inception. The reason for this construction is thus

stated by the Supreme Court of Pennsylvania in the case of *Kirkpatrick vs. Houston, supra*, as follows: 'Any other interpretation of the act would put it in the power of the lender to stamp the character of guilt or innocence on it at the precise point of time convenient for him to elude the prosecution by means of the limitation attached to it. Should the borrower sue at the receipt of the first payment, he might be told that he was too soon; should he wait until the whole was paid, he might be told that the offense had been committed long before, and that the year had gone by.' In this case, however, the learned chief justice (Gibson) uses a single expression that, in our opinion, militates strongly against the doctrine contained in the quotation just given, and furnishes excellent grounds for reaching a different conclusion. He says: 'I will not say that the defendant might not lawfully receive *pro tanto* payment specially in discharge of what was lawfully due, for it is the corruption of taking, and not the corruption of the contract, which constituted the offense to which the penalty is annexed.' The doctrine of this case, therefore, fixes the liability of the lender absolutely by the receipt of any part of the usury as such, and henceforth there is for him no *locus penitentiae*. The same construction which gives a right of action under the statute just as soon as any portion of the usurious interest has been received, without regard to whether any portion of the sum advanced has been returned, as a rule treats such contracts void as to the whole transaction. * * * It sheds much light on the subject to note the fact that the tendency of more modern legislation and judicial determination of this question has been in the direction of mitigating the rigor of the common-law rule that treated all transactions tainted with usury as void, and which also treated any exaction of usurious interest as an offense against as well the moral senses and the laws of God as against those of the realm. * * * So, also, in the State of Massachusetts we have already seen the doctrine held in the case of *Com. vs. Frost* (decided in 1809), that the offense of usury is complete if more than the legal interest is

paid at the time of the loan whether the principal sum is ever refunded or not; and yet it has since been held by the same court that there can be no recovery of usury until the principal and legal interest have been paid; that, up to the receipt of the last payment, the lender has his *locus penitentiae*. *Stevens vs. Lincoln*, 7 Mete. (Mass.), 525; *Saunders vs. Lambert*, 7 Gray, 484. So, also, the doctrine laid down in the case of *Nelson vs. Cooley*, 20 Vt., 204, *supra* (decided at the February term, 1848), is in effect overruled by the same court in the case of *Harvey vs. Insurance Co.* (decided at the May term, 1888), 14 Alt. Rep., 7.

The Supreme Court of South Dakota does not deny the existence of the common-law rule of *locus penitentiae*, as applied to actions to recover back usury paid, and as established by *Wheaton vs. Hibbard*, 20 Johns., 290, and other common-law cases cited by us, but questions only the reason and logic of the rule, saying in the opinion in the case at bar:

> "It is true there are some early cases brought for the recovery of usurious interest under different statutes which have held that an equitable rule should apply, and the debtor should not be entitled to recover a penalty until he has done equity by paying the debt with legal interest in full, but we fail to see wherein any equitable question can arise in this class of cases. These statutes were enacted for the purpose of preventing the taking of usurious interest, and to punish the creditor for contracting for the receiving of usury. There certainly is no question of equity, as ordinarily understood, in any statute providing for penalty, forfeiture, or punishment. On the other hand, what the debtor is entitled to recover by way of penalty or to avoid by way of forfeiture is nothing to which he is equitably entitled, but is based more on the principle underlying the rule of punitive damages. It is not to recover simply what he has suffered, but at the same time to punish the creditor for wrongdoing. Neither

does it seem to us that there is either reason or logic in attempting to apply the rule of *locus penitentiæ* to any case where a party has made an absolute application of money received by him, and continued his business transactions with the party making the payment upon the basis of such application. Of course, all laws against usury are based upon the idea that the contracting for or taking of the same is a wrong. It might as well be said that the embezzler, after converting the thing embezzled, or the thief after taking the thing stolen, when the converting and taking had been with criminal intent, still has the *locus penitentiæ*, and can purge his soul of the crime." (Record, pp. 304-305; *McCarthy vs. First Nat. Bank*, 23 S. D., 277-278.)

8.

In Conclusion.

The order and ruling of the trial court in withdrawing the case from the jury and in directing a verdict for the defendant upon all the issues, and the other rulings along the same line, are erroneous for the reasons assigned, and we think require no further discussion. It will be found that the authorities relied upon by the Supreme Court of the State, and which will be cited by opposing counsel, ignore or cut off entirely the doctrine of *locus penitentiæ*, as applied to this class of cases, and are therefore erroneous, and contrary to the decision of this court in the McBroom case, and the rule approved by it, so clearly stated in *Duncan vs. First Nat. Bank, supra*. The inexorable logic of the Duncan, McBroom, and other cases cited by us, we submit, leaves nothing to support the contention of the defendant. Some shallow annotators, and even some judges, have attempted to cast doubt upon the authority of the Duncan case for failure to distinguish between an actual payment and a mere reservation of usury; but in the Dun-

can, the Alabama and Missouri cases relied upon by us, the interest was paid *as interest*, and the plaintiff was permitted to recover a penalty for interest actually paid more than two years before the action, but within two years after the principal of the original loan had been paid or reduced to judgment. The State Supreme Court concedes that the cases of *Haseltine vs. Central Nat. Bank and First Nat. Bank vs. Deuson, supra*, are on all fours with the case at bar, and hold directly with our contention; but the opinion in the case at bar fails to grasp the full significance of the rule established in those cases, as well as in the McBroom case, which is, not merely that there must have been an actual payment of usury, but that the principal of the original loan must have been paid or reduced to judgment, before the borrower can sue to recover the penalty under the statute. The rule laid down in the Duncan case has been adopted as the rule of this court, and is so plain that it cannot be explained away:

> "From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a *locus penitentiae* for the party *taking the excessive interest*. Any time till then he may consider the excessive *interest paid* on account of the loan, and so apply it and lessen the principal. Up to that time he may make his election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by *taking out* the excessive interest, the cause of action is complete."

Nor is there any ambiguity in the language used by Mr. Justice Harlan in the McBroom case:

"And interest cannot be said to have been collected or received in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all *payments*—collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years, within which the borrower may sue for double the amount of usurious interest *collected and received* from him, does not commence to run, and, therefore, the cause of action does not accrue until the lender has actually *collected or received* more than the original debt with legal interest. These conclusions are supported by adjudged cases." (Then citing and quoting the Duncan case.)

And this clear and unequivocal construction of the statute was approved and followed, after great consideration, in the well reasoned Alabama and Missouri cases, in which, as in the case at bar, there were years of litigation to determine the usurious character of the indebtedness, and in which those high courts held that the cause of action to recover the penalty given by the Federal statute did not accrue until the principal of the original loan had been paid, or reduced to judgment. And such conclusion, as we have seen, is in harmony with the rules of the common law and the principles of equity.

In the case at bar it is undisputed, that the original loan was $4,000, and that the total payments made thereon from the origin of the indebtedness up to the entry of judgment for the principal of the loan, aggregated $3,802.74, and no more.

Wherefore, the plaintiff in error prays that the said judgment and decision of the Supreme Court of the State of South Dakota be reversed, annulled and altogether held for naught, and that he be restored to all things which he has lost thereby, as well as by the said judgment and decision

of the circuit court for said Pennington County, and for such other and further relief in the premises as may be just and proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

(No. 122)

PATRICK B. McCARTHY, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA, Defendant in Error.

In Error to the Supreme Court of the State of South Dakota.

BRIEF FOR DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF THE CASE.

It is alleged in the plaintiff's complaint that between the 22nd day of August, 1887, and January 1st, 1897, the plaintiff paid to the defendant sundry sums of money aggregating $3802.74, as usurious interest upon a usurious loan, and "the defendant knowingly, willfully and corruptly demanded and received the same from the plaintiff as

usurious interest, and knowingly, willfully and corruptly applied the same to the payment of the said corrupt and usurious interest," etc. (Record p. 25.)

It will be observed that there is no controversy but that the usurious interest now sought to be recovered was actually paid by plaintiff in error as usurious interest, and actually received and applied by the defendant in error as such between the 22nd day of August, 1887, and the 1st day of January, 1897.

This action was commenced by the plaintiff on January 25th, 1905, (Record p. 58), or more than eight years subsequent to the date of the last payment of usurious interest. It is undisputed that the original loan was $4,000.00, which amount plus certain taxes and costs, was paid by plaintiff to the defendant on the 21st day of January, 1905. The sole question presented on this appeal is whether or not the plaintiff's cause of action to recover the penalty claimed in his complaint is barred under and by virtue of the provisions of Section 5198 of the Revised Statutes of United States, which requires that an action be commenced within two years from the time the usurious transaction occurred. The plaintiff contends that his cause of action did not accrue in this case until he paid the original loan on the 21st of January, 1905, and hence the statute of limitations did not commence to run until that time; whereas defendant contends that inasmuch as the payments of usurious interest in question were all made by the plaintiff as such and applied by the defendant as such, more than eight years prior to the date of the commencement of this action, that each payment of usurious interest was a usurious transaction, giving rise to a cause of action, and the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received com-

menced to run from the respective dates of the actual payment and application of such usurious interest, and this action not having been commenced within the two years limited by the statute the cause of action is barred.

BRIEF OF ARGUMENT.

I.

UNDER SECTION 5198 OF THE REVISED STATUTES OF UNITED STATES THE LIMITATION OF TWO YEARS WITHIN WHICH THE BORROWER MAY SUE FOR DOUBLE THE AMOUNT OF USURIOUR INTEREST PAID AND RECEIVED AS SUCH COMMENCES TO RUN FROM THE DATE OF THE USURIOUS TRANSACTION, VIZ., THE DATE OF THE ACTUAL PAYMENT OF USURIOUS INTEREST, AND SUIT MUST BE ENTERED WITHIN TWO YEARS FROM THE DATE OF SUCH PAYMENT.

The statutory right of action to recover twice the amount of usurious interest is created by said Section 5198. The very statute creating the right plainly and in unmistakable terms limits the time within which it may be enforced, viz., within two years from the date "the usurious transaction occurred," or the date of the actual payment of usurious interest. If the right is not asserted within the period fixed it ceases to exist, and cannot be claimed or enforced in any form. The section contains no provision whatever requiring the payment of the principal loan, or any part of it, as a condition precedent to the recovery of double the amount of usurious interest actually paid. It is conceded that the payments of usurious interest in controversy were all made by the plaintiff as usurious interest, and applied by the bank as such on and prior to January 1st, 1897. The action was commenced on January 25th, 1905, or more than eight years after the date of the last payment

of usurious interest, for which a double recovery is sought. The statute provides, and the authorities hold, that the cause of action accrues at the very instant the usurious interest is actually paid and received as such, and an action to recover under said Section 5198 must be commenced within two years from the date of such payments. Otherwise, the cause of action is barred.

McCarthy v. First Nat. Bank, 121 N. W. 853. (S. D.).
Citizens Nat. Bank v. Donnell, 195 U. S. 369.
Brown v. Bank, 169 U. S. 416.
Walsh v. Mayer, 111 U. S. 36-37.
First Nat. Bank v. McCarthy, 100 N. W. 16.
Lealos v. Union Nat. Bank, 81 N. W. 56. (N. D.)
Smith v. First Nat. Bank, 75 N. Y. Supt. 131.
First Nat. Bank v. Smith, 54 N. W. 254. (Neb.)
Lenham v. First Nat. Bank, 65 N. W. 786. (Neb.)
Washington Bldg. & Loan Assn. v. Wendlung, 46 S. E. 296. (Va.)
Monongahela Nat. Bank v. Overholt, 96 Pa. 327.
Lebanon Nat. Bank v. Karmany, 98 Pa. 65.
Burnside v. Mealer, 80 S. W. 785. (Ky.)
Buntyn v. Nat. Bldg. & Loan Assn., 38 So. Rep. 345. (Miss.)
Citizens Nat. Bank v. Donnell, 72 S. W. 925 (Mo.)
Talbot v. Bank, 82 N. W. 963; 76 N. W. 726 (Ia.)
Chadwick v. Menard, 20 So. Rep. 933 (La.)
Webb on Usury, Sec. 526.
See also cases collected on page 137 of Vol. 5 of Federal Statutes Annotated.

The decision of this case by the Supreme Court of South Dakota, in *McCarthy v. First National Bank, supra*, is a most learned and profound consideration of the questions in controversy. The decision reviews at length the

authorities relied upon by the plaintiff in error, and points out the inapplicability of the same to the conceded facts in this case. The decision justifies a reading of the same as a whole rather than extracts therefrom. In discussing the position of plaintiff in this case, among other things, the court says:

"Suppose a case where the note is given for the exact amount loaned, but the note provides for a usurious rate of interest, such interest is paid from year to year with the knowledge and consent of the debtor and settlement made on that basis, but such payments never amounted to the principal of the note. This is practically the case at bar, except that we will suppose the payments of interest as made were part at least within two years of the time debtor seeks to recover. The debtor, under appellant's theory, cannot recover, and there will never come a time within which he can recover unless he shall pay enough to amount to the principal, together with perhaps hundreds of dollars of legal interest. He has absolutely no remedy against the party who has crushed him, but who still perchance holds a debt against him as large as the original loan; but if he can raise enough money to pay even one dollar more, and this, with what he did pay before, should exceed such principal and legal interest, then immediately he shall have a cause of action, not for this excess over the principal and legal interest, which in this case would be less than a dollar, but for twice all the interest he has ever paid, no matter whether for 2 or 20 years in the past, which penalty might amount to more than the principal of the debt. Many further illustrations might be given, but the above we think are sufficient to show, not only the injustice of appellant's position, but the unsoundness from a legal point of view."

The Supreme Court of South Dakota, in *First National Bank v. McCarthy, supra*, in speaking of these identical usurious interest payments for which a recovery is now sought, says:

"In the case at bar all the payments of interest were clearly barred by the Statute of Limitations....."

The Supreme Court of New York, in the case of *Smith v. First National Bank, supra*, in a well considered opinion, points out the inapplicability of appellant's leading authority, *McBroom v. Investment Company*, to this class of cases, in the following manner:

"The confusion which has arisen over the question as to when the Statute of Limitations commences to run upon payments of excessive interest, in contravention of the section referred to is attributable in a large measure in failing to distinguish between an actual payment and one that is carried along with the principal indebtedness. In *McBroom v. Investment Company, 153 U. S. 318*, relied upon by the referee and the respondent's counsel, there is nothing in conflict with this plain rendering of the statute." The Court then calls attention to the fact in the McBroom case the only usurious interest actually paid was barred by the statute of limitations, and the claim for such usurious interest abandoned by McBroom. McBroom gave his notes for $65,000 and actually received $58,500, $6,500 having been reserved as a bonus, which made the loan usurious. This bonus was included in and carried along in the loan. The $6,500 was not money paid by McBroom, but a part of the note, and until the note was paid, there was no payment of usury. The Court then says:

"The point of distinction between that case (McBroom) and the present one is that here (the New York case) as each note matured and was renewed, the plaintiff actually paid the discount in cash, and of course the discount or interest was not carried along in the note. When the payment of interest or discount was made, that transaction was completed and the defendant had no election after that to apply this in reduction of the note. That principle

only applies where the discount is added to the note. Had there been no renewal note given, or if given, had it in each instance included the interest, the McBroom case would be applicable. In *Brown v. Bank, 109 U. S., 52*, the Court recognizes the distinction here made, citing the McBroom case as its authority, and says: 'Sometimes interest is said to have been paid when it is evident that it is only included in a renewal, but that, as we have said, was not payment within the meaning of the statute. *Driesbach v. Bank, 104 U. S., 52*. If the note when sued on includes usurious interest, or interest upon usurious interest agreed to be paid, the owner may in due time elect to remit such interest, and it cannot then be said that usurious interest was paid to him, and again, if at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.'"

The New York case, in holding that where usurious interest is actually paid as such, the payee must commence his action to recover, within two years thereafter, uses the following language: "It is a reasonable interpretation of the statute to hold that upon the actual payment of the interest or discount, the cause of action accrues and the two-years Statute of Limitations commences to run from the date of that payment."

In the case of *Walsh v. Mayer, supra*, the Supreme Court of the United States, in construing a statute of the State of Louisiana, similar in terms, said: "But the same provision is contained in Section 5198 of Revised Statutes of the United States in reference to National Banks, under which it has been held that usurious interest actually paid cannot be applied to the discharge of the principal. *Driesbach v. Nat. Bank, 104 U. S., 52. Barnett v. Nat. Bank, 98 U. S., 555*. In *Cooke v. Lillo, 103 U. S., 792*, the Louisiana statute was considered, and upon the decisions

of the Supreme Court of the State it was decided that the usurious interest cannot be reclaimed, nor be imputed to the principal unless a suit for its recovery is begun or plea of usury is set up to the claim within twelve months after the payment is made. * * * * But the right claimed under the law of Louisiana must be taken as it is given, and it is not divisible. The provisions requiring it to be asserted in a particular mode, and within a fixed time, are conditions and qualifications attached to the right itself, and do not form part of the law of remedy. If it is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced in any form."

In the case of *First Nat. Bank v. Smith, supra*, the Supreme Court of Nebraska, in a carefully written opinion, in considering the identical question herein involved, says: "What is meant by the phrase, 'from the time the usurious transaction occurred,' in the connection in which it is used in the section? Clearly it does not refer to the time the usurious contract is entered into, for the section gives the borrower no right of action to recover a penalty where unlawful interest is stipulated for, and not paid, but in such case the loaner merely forfeits the entire interest. Nor is it payment of the principal sum borrowed which gives the right to sue for the penalty. The actual receipt of the illegal interest is the foundation of the borrower's right to recover the penalty, and the actual payment of interest in excess of the legal rate is 'usurious transaction' referred to in the section. The period of limitation begins to run from the time the *cause of action* accrues. If the interpretation for which plaintiff contends should be adopted, then it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid

large sums of money as illegal interest on a loan, and is unable to pay the entire debt, is not entitled to the benefit of the section. Such was not the intention of congress, nor is it the fair and reasonable import of the language of the section. The right to maintain an action to recover the penalty prescribed by said section 5198 accrues as soon as any unlawful interest is paid, and the two-years limitation begins to run from the time such payment is made. The following cases support the doctrine: *Shinkle v. Bank*, 22 Ohio St., 516; *Hintermister v. Bank*, 64 N. Y. 212; *Stephens v. Bank*, 88 Pa. St. 157; *Brown v. Bank*, 72 Pa. St. 209; *Lynch v. Bank*, 22 W. Va. 544; *Bank v. Carpenter*, 52 N. J. Law 165; 19 Atl. Rep. 181; *Stout v. Bank*, (Tex. Sup.) 8 S. W. Rep. 808; *Bank v. Alves* (Ky.) 15 S. W. Rep. 132.

In *Lynch v. Bank*, *supra*, the court, in considering the identical question herein involved, after citing and quoting from numerous decisions from the courts of different states, in the opinion say: "If these cases do not expressly decide that the right of action for the prescribed penalty accrues at the instant any excessive interest is paid, whether it be on the original discount or at any subsequent renewal, and that each payment is in itself a cause of action, against which the limitation commences to run, they so clearly indicate that such is the proper construction of the statute as to leave no doubt on the question. I have been unable to find authority or precedent to the contrary; and as the construction indicated, if not established, by these cases, is in consonance with the letter and spirit of the statute, as well as in accord with the evident reason and policy of congress in enacting it, I feel no hesitation in adopting it. Each payment of illegal interest must be regarded as a 'transaction' within the intent of the statute, and, when such payment is

actually made or occurs, the two-year limitation commences to run as to that payment, from that time, and so on for each successive payment on renewals of the same loan; and, if, when the action is commenced for the penalty, any one or more of such payments of illegal interest occurred more than two years prior thereto, no recovery can be had for it, although the original loan be then unpaid.' Both upon reason and authority, we are satisfied that the action to recover the penalty for receiving the $88 illegal interest is barred, since the same was taken more than two years before this suit was brought."

The Supreme Court of North Dakota, in *Lealos v. Union Nat. Bank, supra*, in considering this question said: "The right to sue to recover back (in other words, a cause of action) is not given until the usurious interest is paid and the right of recovery arises at once upon such payments, in favor of the person making it, or his or her legal representatives, and to no other person. In *Stephens v. Bank, 88 Pa. St. 157*, it was said 'that the remedy for the owner to recover back is by a personal action. The right of action accrues the very instant the usury is paid,' and this 'whether the debt has been paid or not.' *Bank v. Overholt, 96 Pa. St. 327*. 'It is actual payment on the foot of the usurious contract, either in whole or in part, which consummates the usury, and from which the limitation of the action for the penalty commences to run.' *Brown v. Bank 72 Pa. St. 209; Shinkle v. Bank, 22 Ohio St. 517; Hintermister v. Bank, 64 N. Y. 212*. 'Each payment of illegal interest must be regarded as a "transaction" within the intent of the statute, and, when such payment is actually made or occurs, the two-years limitation commences to run as to that payment from that time' *Lynch v. Bank, 22 W. Va. 554*."

In the case of *Monongahela Nat. Bank v. Overholt, supra*, the Court says:

"Upon the actual payment by the borrower and receipt of the illegal interest by the bank, the right of action accrues, and can be maintained whether the debt has been paid or not. This cannot be more clearly expressed than in the words of the statute, and decisions under other statutes having little similarity to this do not warrant departures from the plain meaning of the remedial and punitory provision." And, again, the court says in speaking of the remedy of the debtor: "He may recover back twice the amount of interest thus paid by action in the nature of debt, and this is akin to double or treble damages for injuries allowed by certain statutes for the twofold purpose of compensation and example."

In *Lebanon Nat. Bank v. Karmany, supra*, the Court says:

"If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest when sued for the penalty to chop around and call it a credit on the principal, would vitiate the vindicatory clause of the statute. In such case the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting."

The doctrine of the foregoing cases is in harmony with the plain provisions of Section 5198, which gives a party the right to recover twice the amount of usurious interest, providing suit therefor is entered within two years from the date of the usurious transaction, or from the date of the actual payment and application of the usurious interest, without reference to the payment of the principal of the

loan, or without reference to whether the principal loan or any part thereof be paid at all or not.

II.

WHERE USURIOUS INTEREST HAS BEEN PAID TO A NATIONAL BANK THE REMEDY AFFORDED BY SECTION 5198 OF THE REVISED STATUTES IS EXCLUSIVE, AND IS CONFINED TO AN INDEPENDENT ACTION TO RECOVER SUCH USURIOUS PAYMENTS.

Schuyler Nat. Bank v. Gadsden, 191 U. S. 451.
Haseltine v. Central Nat. Bank, 183 U. S. 132.
Driesbach v. Wilkesbarre Nat. Bank, 104 U. S. 52.
Barnet v. Nat. Bank, 98 U. S. 555.
Farmers' etc Bank v. Dearing, 91 U. S. 29.
Walsh v. Mayer, 111 U. S. 31.
Stephens v. Monongahela Bank, 111 U. S. 197.

"As without the statute there can be no recovery from the bank for usurious interest actually paid, and as the statute which gives the right to such recovery also prescribes the remedy, that remedy is exclusive of all others for the enforcement of such right."

III.

DOCTRINE OF LOCUS PENITENTIAE.

Plaintiff criticizes the decision of the Supreme Court of South Dakota in this case, together with the authorities relied upon, for the reason that such decisions ignore or cut off entirely the doctrine of *locus penitentiae* as applied to this class of cases. On the other hand defendant contends that such decisions have fully recognized and correctly applied the doctrine of *locus penitentiae* as applied to this class of cases. The usurious interest payments were made

between the 22nd day of August, 1887, and January 1st, 1897, covering a period of nearly ten years. Up to the time of the actual payment of usurious interest the bank had the right to elect not to receive the usury. However, the bank elected to and did accept and applied the usurious interest. As soon as the usurious interest was actually paid, received and applied as such, "a cause of action arose for the recovery of twice the amount so paid, and no subsequent change of mind by the bank can defeat the liability which has become absolute." To illustrate, suppose the plaintiff had given the bank his note for $4,000.00 due one year after date, drawing interest at a usurious rate of interest, interest payable annually. Notwithstanding the fact the contract called for usurious interest, yet there was a *locus penitentiae* on the part of the bank to decline to receive the usurious interest as such at the end of the year; but if at the end of the year it did so receive and apply the usurious interest, a cause of action under the statute immediately accrued.

The Supreme Court of South Dakota in its decision in this case, in discussing the doctrine of *locus penitentiae* says:

"The cases supporting respondent's position hold that while the payee after contracting to take, receive, or charge a usurious interest, has at all times before applying a payment the benefit of the doctrine of *locus penitentiae*. Yet if he does actually make the application of a payment to the payment of usurious interest, his election as against him is final, and he becomes at once liable for the penalty. And, furthermore, if when such payment is made and applied such application is with the consent of the debtor, the maker of the note, then, as against his right to action to recover the statute immediately commences to run."

And further: "Neither does it seem to us that there

is either reason or logic in attempting to apply the rule of *locus penitentiae* to any case where a party has made an absolute application of money received by him, and continued his business transactions with the party making the payment upon the basis of such application. * * * * * It might as well be said that the embezzler, after converting the thing embezzled, or the thief after taking the thing stolen, when the converting and taking had been with criminal intent, still has the *locus penitentiae*, and can purge his soul of the crime. As we have noted above, the courts are unanimous in holding that under this statute the maker of a note when sued thereon cannot plead the payments of usury either as a credit on the note or as a counterclaim or offset. So in the case at bar, when the plaintiffs were sued on the notes herein they could not plead in any manner as a defense to the principal of said note any part of the large sum which they had paid as interest. Why was this? Because they were payments which had by the act of both parties already been applied on usury. It may well then be asked, can these payments be held to have been such payments for one purpose, to-wit, to prevent the debtor from receiving a credit therefor, while, on the other hand, the law be allowed to step in and relieve the payee who has made this application, and say to him, "You have done no wrong for which you can be holden, because perchance the debtor has been unable to pay the debt." In considering any interpretation to be put on the section in question, it is well to bear in mind two other propositions sustained by the courts. The penalty to be recovered is twice all the interest that has been paid, not merely twice the excess which has been paid above legal interest."

In other words the Court holds that the Bank could take the benefit of the rule of *locus penitentiae* at any time prior to the actual payment and actual receipt of the usurious interest. When it elected to accept and apply the usurious interest as such, the right of *locus penitentiae* thereupon ceased. The same court referring to the case of *Citizens Nat. Bank v. Donnell, supra*, says:

"In discussing the doctrine of *locus penitentiae*, after referring at some considerable extent to different cases, all of which are cited by the appellants (plaintiff in error) in their brief, as supporting their doctrine of this case, they say: 'Any such ruling would be in the face of express provisions of the statute, and thwart its very purposes. It would be an inducement to national banks to charge usurious interest, and when compelled to sue upon its paper containing usury, and that defense is pleaded, simply say to the debtor, "We will credit the amount of the usurious interest paid by you on the principal of your debt," and thereby escape the penalty of the law. Certainly no such consequences were intended by it.' This same case was appealed to the United States Supreme Court, opinion being found in 195 U. S. 369, wherein, in speaking of this same question of right of election, or as otherwise termed, *locus penitentiae*, the courts say: 'We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. St. Sec. 5198, in absolute terms by then declaring an election to remit the excessive interest.' And certainly this proposition should not only apply to an action by a bank to collect on the note, but, on the other hand, it should also apply in theory against the creditor whenever he has made an application of payment on usurious interest and suit is brought for the penalty, and should apply also on behalf of the creditor as against the debtor whenever the debtor was a party to such application."

In the McBroom case the claim for usurious interest actually paid was abandoned by McBroom, evidently for the reason that his action had not been commenced within three years from the date of the actual payment. After abandoning the claim to usurious interest actually paid, he sought to recover under the Statute of New Mexico, which is materially different from the national banking act, interest reserved and carried along in the note. The Court, however, in considering the effect of the actual payment of usury,

quoted from the Duncan case as follows: "When the payment is actually made * * * the election is made * * * and the cause of action is complete."

The Supreme Court of New York, in *Smith vs. First National Bank, supra*, in speaking of the payment of usurious interest and election to accept same by the bank said: "When the payment of interest or discount was made the transaction was completed and the defendant had no election after that to apply this in reduction of the note."

Mr. Justice Hobson, in the case of *Citizens National Bank v. Gentry, 63 S. W. 454 (Ky.)* states the same question in the following clear cut manner: "As soon as usury is in truth paid, a cause of action arises for the recovery of twice the amount so paid, and no subsequent change of mind by the bank can defeat the liability which has become absolute."

Mr. Justice Harlan, who also wrote the opinion in the McBroom case, in *Brown v. Bank, 169 U. S., 416*, said: "If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then and not before, occurred, and he must sue within two years thereafter."

Many of the cases hereinbefore cited, treat of the same point in a variety of ways. The deduction from all of the cases is that when usurious payment is made and the bank elects to accept and receive it as such, a cause of action for twice the amount so paid, accrues immediately, and as a consequence the two year statute of limitations commences to run from that date. It follows that this action is clearly barred by the two-year limitation statute.

IV.

A RIGHT TO RECOVER TWICE THE AMOUNT OF USURIOUS INTEREST PAID UNDER SECTION 5198, REVISED STATUTES, IS NOT CONDITIONED ON PAYMENT OF THE PRINCIPAL OF THE LOAN.

As before observed, the actual payment of usurious interest gives rise to a cause of action for the recovery of twice the amount of usurious interest paid under said Section 5198, without regard to the payment of the principal of the loan, or whether the same is paid at all or not. The payment of the principal of the loan has nothing to do with the cause of action arising upon the actual payment of usurious interest to national banks. No such requirement is contained in Section 5198.

What little confusion there is in the authorities, is consequent upon a failure to distinguish between an actual payment and a mere reservation of usury. "Two separate and distinct classes of cases are contemplated by this section: First, those wherein usurious interest has been taken, received, reserved or charged, in which case there shall be 'forfeiture of the entire interest, which the note, bill or other evidence of debt, carries with it, or which has been agreed to be paid thereon.' Second, in case usurious interest has been paid, the person paying it may recover back twice the amount of the interest 'thus paid, from the association taking or receiving the same.' While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid in contradistinction to interest actually paid which is covered by the second clause of the section. Carrying this perfectly

obvious distinction in mind, the cases in this Court are entirely harmonious."

Hazeltine v. Central Nat. Bank, 183 U. S., 132; see also Norfolk Nat. Bank v. Schwenk, supra.

The Supreme Court of Nebraska, in *First National Bank v. Smith, supra*, answers the contention appellant is making here, in the following convincig manner: "If the interpretation for which plaintiff contends shall be adopted, then it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid large sums of money as illegal interest on a loan, and is unable to pay the entire debt, is not entitled to the benefit of the section. Such was not the intention of congress, nor is it fair and reasonable import of the language of the section. The right to maintain an action to recover the penalty prescribed by Section 5198 accrues as soon as any unlawful interest is paid and the two-year limitation begins to run from the time such payment is made."

The Supreme Court of North Dakota, in *Lealos v. Union Nat. Bank, supra*, quotes approvingly from the Supreme Court of Pennsylvania, as follows: "The right of action accrues the very instant the usury is paid." And this "whether the debt has been paid or not."

Webb on Usury, Section 526, states the rule as follows: "The only true rule founded in principle is that where the parties agree that certain payments shall be applied upon the usury, the penalty is incurred." * * * * Where there have been several payments to the bank, each payment of illegal interest must be regarded as a 'transaction' within the intent of the statute, and when such pay-

ment is actually made or occurs, the two-year limitation commences to run as to that payment from that time, and so on for each successive payment on renewals of the same loan, and if, when the action is commenced for the penalty, any one or more of such payments of illegal interest occurred more than two years prior thereto, no recovery can be had for it, although the original loan be then unpaid."

The annotators in the recent, excellent and most thorough work, Federal Statutes Annotated, at page 138 of Volume 5, in placing the Duncan case as opposed to the weight of authority, and in speaking of the holding that the limitation did not begin to run until the actual payment of the loan, says: "But the authority of this case may well be doubted for failure to distinguish between actual payment and a mere reservation of usury."

The same work at Volume 5, page 136, in placing the case of *Hazeltine v. Central National Bank*, relied upon by appellant, as opposed to the weight of authority, says: "Which case, however, apparently fails to discriminate between a reservation and an actual payment of interest."

The Supreme Court of Kentucky in the case of *Second National Bank v. Fitzpatrick, 111 Ky. 228*, declined to follow the case of *Hazeltine v. Central National Bank* and held that "the principal sum, due upon the note need not be paid or tendered before the commencement of a suit for statutory penalities for the collection of usurious interest."

CONCLUSION.

The authorities relied upon by plaintiff clearly fail to distinguish between the actual payment and a mere reservation of usury, and hence are not controlling in cases such as this. The facts material to this case are not in controversy.

Plaintiff seeks to recover twice the amount of usurious interest actually "paid" and applied more than eight years prior to the date of the commencement of this action. Under the unmistakable language of Section 5198 of the Revised Statutes of United States, and the consistent construction thereof by courts of the highest authority, the plaintiff's cause of action is barred, not having been commenced within two years from the date of the actual payment of usurious interest.

Wherefore, the defendant in error prays that the said judgment and decision of the Supreme Court of the State of South Dakota, as well as the said judgment and decision of the Circuit Court for said Pennington County be in all things confirmed, and for such other and further relief in the premises as may be just and proper.

Respectfully submitted,

CHARLES J. BUELL,
A. K. GARDNER,
Attorneys for Defendant in Error.

McCARTHY *v.* FIRST NATIONAL BANK OF RAPID CITY, SOUTH DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 122. Argued December 19, 1911.—Decided February 19, 1912.

The two-year limitation in Rev. Stat., § 5198, within which an action must be commenced against a national bank to recover double the amount of payments of usurious interest, begins to run from the time of payment of the usurious interest, and not from the time of payment of the note.

National banks are prohibited from making usurious contracts, and whenever the debtor is sued on such a contract, he may plead the usury and be relieved from payment; as to this defense there is no statute of limitations.

Where a national bank reserves or deducts usurious interest in advance, the debtor may plead usury, but may not recover double the amount paid under § 5198, Rev. Stat.

When the debtor actually makes, and the national bank knowingly receives and appropriates, a payment of usurious interest, the cause of action arises and the statute begins to run.

There is no *locus penitentiæ*. That privilege is only granted to those banks which, having charged usury, may by refusal to accept interest when tendered show that they will not carry the illegal contract into effect.

18 So. Dak. 218, affirmed.

PATRICK B. McCARTHY, under the provisions of Rev. Stat., § 5198, brought suit against the First National Bank of Rapid City, South Dakota, for twice the amount of interest paid the bank.

The complaint alleged that, the maximum legal rate being 12 per cent, McCarthy, on August 27, 1887, borrowed from the defendant $4,000, giving therefor promissory notes payable at different dates, each bearing

18 per cent interest. These notes were not paid at maturity, and from time to time were renewed at the same rate. Many payments of usurious interest were made. The debt was finally consolidated into a note, bearing 12 per cent interest, dated May 22, 1889, for $5,000, which included the original principal and unpaid interest. It was renewed and secured by mortgage July 22, 1891. McCarthy alleges that between August 27, 1887, and January 1, 1897, he paid on the original and renewal notes various sums, aggregating $3,802.74, as interest, and that the defendant "knowingly . . . applied the same to the payment of usurious interest, and endorsed the same on the said several promissory notes as interest received thereon."

On January 26, 1897, the bank instituted proceedings to foreclose the mortgage given by plaintiff, his wife and others to secure the debt. McCarthy filed a plea of usury, which was sustained, and, after purging the debt of usury and forfeiting all interest, a decree was finally entered, January 12, 1905, foreclosing the mortgage for $5,951.56, made up of the original debt of $4,000, taxes paid on the mortgaged property, and costs. On January 21 this sum was paid to the bank, and on January 25, 1905, plaintiff brought this suit for $7,605.48, or twice the amount of interest paid. The defendant set up, by its plea, that the action was barred, because not brought within two years from the date of payment of the usurious interest. The plaintiff replied that the statute only began to run from the date the debt was paid. For the purpose of showing that the payments on account of interest ($3,802.79) did not equal the amount of the original debt ($4,000), and that the judgment had been paid (Jan. 21, 1905), less than two years before suit, he offered the record in the foreclosure proceedings. It was excluded by the trial court, but incorporated in the record by bill of exceptions.

Mr. Hannis Taylor, with whom *Mr. Charles W. Brown*, *Mr. John F. Schrader* and *Mr. Clarence L. Lewis* were on the brief, for plaintiff in error:

Under § 5198, Rev. Stat., the limitation of two years within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt. *McBroom* v. *Investment Co.*, 153 U. S. 318; *Investment Co.* v. *McBroom* (N. Mex.), 30 Pac. Rep. 859; *Duncan* v. *First Nat. Bank*, 8 Fed. Cases, 11; *First Nat. Bank* v. *Denson*, 115 Alabama, 650; 22 So. Rep. 518; *Hazeltine* v. *Cent. Nat. Bank*, 155 Missouri, 66; 56 S. W. Rep. 895; *First Nat. Bank* v. *Childs*, 130 Massachusetts, 519; *First Nat. Bank* v. *Turner* (Kan.), 43 Pac. Rep. 936; *First Nat. Bank* v. *McInturff* (Kan.), 43 Pac. Rep. 839; *Louisville Tr. Co.* v. *Ky. Nat. Bank*, 102 Fed. Rep. 442; *Same* v. *Same*, 87 Fed. Rep. 143; *Harvey* v. *Nat. L. Ins. Co.*, 60 Vermont, 209; 14 Atl. Rep. 8; *Cotton States Bldg. Co.* v. *Peightal*, 67 S. W. Rep. 524; *Wheaton* v. *Hibbard*, 20 Johns. 290; *Stevens* v. *Lincoln*, 7 Met. 525; *Saunders* v. *Lampert*, 7 Gray, 484; *Smith* v. *Robinson*, 10 Allen, 132; *Hall* v. *First Nat. Bank*, 30 Nebraska, 99; 46 N. W. Rep. 151; *Kendall* v. *Crouch* (Ky.), 11 S. W. Rep. 587; *Talbot* v. *First Nat. Bank*, 185 U. S. 172; *Talbot* v. *Sioux Nat. Bank*, 185 U. S. 182.

At common law the borrower could not recover the penalty given by the statutes relating to usury, without paying or offering to pay at least the principal of the loan, and the decisions in the *Duncan* and *McBroom cases* result from the application of common-law principles, including the doctrine of *locus penitentiæ*, to the National Bank Act. *Wheaton* v. *Hibbard*, 20 Johns. 290; *Investment Co.* v. *McBroom* (N. Mex.), 30 Pac. Rep. 859; *Stevens* v. *Lincoln*, 7 Met. 525; *Saunders* v. *Lambert*, 7 Gray, 484; *Smith* v. *Robinson*, 10 Allen, 130; *McBroom* v.

Investment Co., supra; Hazeltine v. *Central Nat. Bank, supra; First Nat. Bank* v. *Denson, supra.*

Mr. Charles L. Buell, with whom *Mr. A. K. Gardner* was on the brief, for defendant in error:

Under § 5198, Revised Statutes of United States, the limitation of two years within which the borrower may sue for double the amount of usurious interest paid and received as such commences to run from the date of the usurious transaction, viz., the date of the actual payment of usurious interest, and suit must be entered within two years from the date of such payment. Otherwise, the cause of action is barred. *McCarthy* v. *First Nat. Bank,* 121 N. W. Rep. 853; *Citizens' Nat. Bank* v. *Donnell,* 195 U. S. 369; *Brown* v. *Bank,* 169 U. S. 416; *Walsh* v. *Mayer,* 111 U. S. 36; *First Nat. Bank* v. *McCarthy,* 100 N. W. Rep. 16; *Lealos* v. *Union Nat. Bank,* 81 N. W. Rep. 56; *Smith* v. *First Nat. Bank,* 75 N. Y. Supp. 131; *First Nat. Bank* v. *Smith,* 54 N. W. Rep. 254; *Lanham* v. *First Nat. Bank,* 65 N. W. Rep. 786; *Washington Bldg. & Loan Assn.* v. *Wendlung,* 46 S. E. Rep. 296; *Monongahela Nat. Bank* v. *Overholt,* 96 Pa. St. 327; *Lebanon Nat. Bank* v. *Karmany,* 98 Pa. St. 65; *Burnside* v. *Mealer,* 80 S. W. Rep. 785; *Buntyn* v. *Nat. Bldg. & Loan Assn.,* 38 So. Rep. 345; *Citizens' Nat. Bank* v. *Donnell,* 72 S. W. Rep. 925; *Talbot* v. *Bank,* 82 N. W. Rep. 963; 76 N. W. Rep. 726; *Chadwick* v. *Menard,* 20 So. Rep. 933; Webb on Usury, § 526. Cases collected in 5 Fed. Stat. Ann. 137.

The right to maintain an action to recover the penalty prescribed by § 5198 accrues as soon as any unlawful interest is paid, and the two-year limitation begins to run from the time such payment is made. The following cases support the doctrine: *Shinkle* v. *Bank,* 22 Oh. St. 516; *Hintermister* v. *Bank,* 64 N. Y. 212; *Stephens* v. *Bank,* 88 Pa. St. 157; *Brown* v. *Bank,* 72 Pa. St. 209; *Lynch* v. *Bank,* 22 W. Va. 544; *Bank* v. *Carpenter,* 52 N. J. Law,

165; 19 Atl. Rep. 181; *Stout* v. *Bank* (Tex. Sup.), 8 S. W. Rep. 808; *Bank* v. *Alves* (Ky.), 15 S. W. Rep. 132.

Where usurious interest has been paid to a national bank the remedy afforded by § 5198, Rev. Stat., is exclusive, and is confined to an independent action to recover such usurious payments. *Schuyler Nat. Bank* v. *Gadsden*, 191 U. S. 451; *Hazeltine* v. *Central Nat. Bank*, 183 U. S. 132; *Driesbach* v. *Wilkesbarre Nat. Bank*, 104 U. S. 52; *Barnet* v. *Nat. Bank*, 98 U. S. 555; *Farmers' &c. Bank* v. *Dearing*, 91 U. S. 29; *Walsh* v. *Mayer*, 111 U. S. 31; *Stephens* v. *Monongahela Bank*, 111 U. S. 197.

Notwithstanding the fact the contract called for usurious interest, yet there was *locus penitentiæ* on the part of the bank to decline to receive the usurious interest as such at the end of the year; but if at the end of the year it did so receive and apply the usurious interest, a cause of action under the statute immediately accrued. Cases *supra*, and see also *Citizens' National Bank* v. *Gentry*, 63 S. W. Rep. 454 (Ky.); *Brown* v. *Bank*, 169 U. S. 416.

The deduction from all of the cases is that when usurious payment is made and the bank elects to accept and receive it as such, a cause of action for twice the amount so paid accrues immediately, and as a consequence the two-year statute of limitations commences to run from that date. It follows that this action is clearly barred by the two-year limitation statute.

A right to recover twice the amount of usurious interest paid under § 5198, Rev. Stat., is not conditioned on payment of the principal of the loan. *Hazeltine* v. *Central Nat. Bank*, 183 U. S. 132; see also *Lealos* v. *Union National Bank, supra;* Webb on Usury, § 526; 5 Fed. Stat. Ann. 138.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

Section 5198 of the Revised Statutes, under which this

suit was brought, provides that "taking, receiving, reserving, or charging" more than a lawful rate of interest, when knowingly done by a national bank, shall be deemed a forfeiture of the entire interest. In case a greater than the lawful rate "has been paid, the person by whom it has been paid, may recover back twice the amount of the interest thus paid, . . . provided such action is commenced within two years from the time the usurious transaction occurred."

The debt was created in 1887, was paid in full in January, 1905, and on January 25, of the same year, the maker of the note brought suit to recover twice the amount of the interest paid thereon prior to 1897.

In considering the bank's plea that the action was barred because not brought within two years, and the plaintiff's claim that the statute only ran from the date the debt was paid, the Supreme Court of South Dakota pointed out the irreconcilable conflict in the cases dealing with this question, and, after making a careful analysis of all the authorities, reached the conclusion, in which we concur, that the statute begins to run from the date of the payment of the usurious interest. 17 S. Dak. 393. Considering this review of the decisions, we shall only discuss the statute itself, and that briefly.

National banks are prohibited from making usurious contracts. If they disregard its provisions, the law not only furnishes a defense, but gives a right of action. As to the defense, there is no statute of limitations. Whenever sued the debtor may plead the usurious contract and be relieved from paying any interest whatever. But if he elects to avail himself of the cause of action, he must sue "within two years from the time the usurious transaction occurred."

If the making of the note was the "usurious transaction," from which date the statute began to run, the anomaly of the right to recover being barred before the

cause of action arose would result in all cases where the debtor for two years after the loan failed to pay interest, even though he subsequently discharged the debt, principal and usury. If the final payment of the debt is the "usurious transaction" and suit must be brought in two years from that date, then there could never be a recovery in those cases where the debtor had paid usury, but was not able to pay the debt in full.

That the statute does not begin to run from the date of the loan, nor from the date of the satisfaction of the debt, but from the date interest is paid, appears from an analysis of the two classes of cases referred to in Rev. Stat., § 5198, noting that "interest paid" in the last clause is used in contradistinction to interest "reserved or charged," in the first sentence of the section. Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance, by way of discount, the statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank. These deductions by way of discount are not treated as payments. They do not come out of the debtor's pocket, though they lessen the amount which he receives when the loan is made, and when sued he may plead usury and escape liability for the amount thus charged or retained. But, such reservation by the bank, not being a payment made by the debtor, he, of course, cannot avail himself of the right to maintain a suit given only to those who have paid interest.

But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, the right of the one and the liability of the other is fixed, the cause of action arises and the statute of limitations begins to run. There is no *locus penitentiæ*. That privilege is only granted to those banks which, having charged

usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the two-fold penalty.

Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by statements of Mr. Justice Harlan in *McBroom* v. *Investment Co.*, 153 U. S. 318, which involved the construction of the usury statute of the Territory of New Mexico. That act differed in several respects from Rev. Stat., § 5198. But that case did not rule that in a suit under the act of Congress the statute did not run from the date usury was paid and received as such. This court did not understand that such was the meaning of that case, as appears from his opinion in *Brown* v. *National Bank*, 169 U. S. 416, which involved a construction of Rev. Stat., § 5198. For he there points out the difference between "paying" and "agreeing to pay," and says that, "if at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have then and not before occurred, and he must sue within two years thereafter."

The Supreme Court of South Dakota properly held that the recovery of interest paid more than two years before suit was brought was barred, and its judgment is

Affirmed.